

THE HISTORICAL INPUT OF LITHUANIA IN THE CREATION OF THE CONCEPT OF THE STATE UNDER THE RULE OF LAW

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The Idea of the Concept of State Under the rule of Law in Lithuanian Legal Doctrine of the 16-17th Centuries

S u m m a r y

The idea of this first part of the continuous article is to evaluate the historical experience of the Lithuanian legal thought according to the concept of the state under the rule of law and to show that the Lithuanian legal doctrine in the 16th century was based on the democracy of the antique towns and the humane ideas of the early Christianity, which embraced in this period many principles of the state under the rule of law.

The attitude of the Lithuanian lawyers of the 16th century Andrius Volanas, Mykolas Lietuvis (Michalonis Lituanius), Petras Skarga, Augustinas Rotundas and others towards the origin of state, relations between law and state and the place of compulsion in the society are discussed in the article.

Concept of the state under the rule of law as the method to understand heritage of the legal thought in a new way. Today concept of the state under the rule of law is important not only as the ideal of the state development and the aim of aspiration, but also as the method (criterion) to read and understand the legal experience of the nation in a new way, to feel the living pulse of the advanced legal thought, to revive it and to strengthen by it the efforts of the Lithuanian nation in creating the contemporary state under the rule of law.

Historical self-knowledge are the measures to surmount the psychology of outsiderism. The history of Lithuanian thought of law has never been specially researched according to the statehood of law, though general statements that “[...] the idea of legal state is clearly expressed in Lithuanian Statutes” (Vasilevskiene (1), Jurginis (2)), that Leonas Sapiega propagated this idea (Makarevicius, Zulys (3), that “the noblemen of Great Duchy of Lithuania created legal feudal state” (Lazutka) (4), it is possible to find already in the works of the philosophers and historians of soviet period, but for some reason not in the works of lawyers. Maybe it happened because the lawyers, who were ideologically disciplined and “nearer to the power”, “knew” better than philosophers and historians about

the unacceptability of the concept of legal state as being against totalitarian state and inviting for democratical values for the soviet science of law (1).

Also the occupational regime, while trying to paralyze from inside the resistance against occupation and the onslaught towards freedom, did not stimulate interest into the authentic history of the nation, strived to keep silence about the most important achievements of the historical creation of the nation, hampered to evaluate them precisely. If the features of concept of the state under the rule of law were found in the Statutes, it would give the highest evaluation to them, to their creators and to the epoch itself from the point of view of the historical progress. The occupied nation must not know it; it can know the Statutes, their particular ideas, but must not know their real value from the point of view of historical perspective, in order it would be easier to implant the complex of cultural inadequacy and the psychology of outsider: as if in the previous creation of the nation there is nothing important what would interest the modern man.

The fact that it did not remain without sign, at some extent can be certified by the not far advanced our self-knowledge of law, and first of all of the legal statehood. We are hurrying to know what has been done in the creation of legal state in the USA, in Western Europe, but we are not hurrying to know our own level, because at some extent it is blocked by the just mentioned preconceived "knowledge" that this our own simply "does not exist". In the E. Kuris introductory article of the book "Traditions of the Western law" by Glendon and others we read that the idea of the state under the rule of law, which appeared in Lithuania in 1988, could not "recover" from "the heritage of Baltic countries" already because of the fact that "the legal thought in the prewar Lithuania was absolutely rhetoric" (2).

But it is enough to go a little deeper into the history of Lithuanian legal thought to become sure that such evaluation is wrong from the point of view not only of second Republic of Lithuania but also from Lithuanian legal thought of earlier epochs. We shall try to show here that "the backward Lithuania" already in the 16th century had the basis, which can prove that the legal thought in Lithuania at that time was not "only rhetoric" and was not backward. Our historians had already proved not only today that Lithuania in the 16th century was in the forward of the Western European legal and politological culture and in some cases (law of the state) was even ahead. Democratical tendencies in the legal thought, as we will see, were alive during all the periods of free development of the nation.

To know ourselves – is not only a patriotic but also an economical idea, because it is always more simple and cheaper to use our own basis achieved than to buy it from strangers. We should be interested in the achievements of strangers where our cultural working basis ends. This is the concept of any rational conscience if it is not disturbed by the cultural "virus" of inadequacy.

Idea of the state under the rule of law is the ideology of the educated individual.

In Lithuania, as in other countries, the interest into ideas, which are peculiar to the concept of the state under the rule of law, became active at those stages of their development, when the self-defense of citizens from the governmental self-will power, which limit their freedom to undertake wider independent creative actions and through that creation to become the subjects of their own fate and welfare, becomes more intensive. The fight for law always was the fight for the progress of civilization, the way to which always went through the main road – the freedom of individual. And the latter demanded for the state under the rule of law as an authentic political organization of their own.

Such periods in Lithuanian history were: The First Republic (second half of the 16th century – 18th century), The Second Republic (1919-1940) and The Third Republic of nowadays. (Such classification of the historical development of the form of the Lithuanian state for somebody can seem not unexpected because up till now there was no research, which would answer to the question what was the Great Duchy of Lithuania according to the governing form, according to the location of territorial power and according to the political

(state) regime. According to the form of government (according to the fact from where the great duke of Lithuania got the power authority – from heritage or from the “political nation”) the Great Duchy of Lithuania evolutionized from absolute monarchy (13th - 14th century) to limited monarchy (15th - first half of the 16th century) and at last to the republic (second half of the 16th century – 18th century), when after the death of Sigmund August the dynasty of Lithuanian dukes ends and great duke of Lithuania and king of Poland becomes elected by nobility, this way accepting that the sovereignty of state the ruler gets not through heritage but from “political nation” (nobility), which now is proclaimed the only owner of the national sovereignty. It showed that from the second half of the 16th century Great Duchy of Lithuania according to the form of power was the aristocratic republic.) Namely at these periods the Lithuanian politological and legal thought showed the biggest interest into the idea of state under the rule of law and left the residual footmark in it.

There are three extremely significant legal monuments of the European importance to understand the Lithuanian political legal thought of the 16th century from our point of view: Lithuanian Statutes, also selected works of the lawyers of Great Duchy of Lithuania Andrius Volanas (around 1530 - 1610), Mykolas Lietuvis (Michalonis Lituanus), Albertas Gostautas (died in 1539), Leonas Sapiega (1557 - 1633), Petras Roizijus, Augustinas Rotundas (around 1520 - 1582), Mikalojus Husovianas (around 1475 - after 1533), Petras Skarga (1536 – 1642), Aronas Olizarovichius (1618 – 1658 or 1659), Jonas Chondzinskis and others, various religious works of protestants, who looked for the model of the “well organized state” and created the theoretical foundations of it.

The ideas of many of them, first of all of A. Volanas, as we will see, sound so modern at the end of the 20th century that when we read them, willing unwilling we are forced “to believe” in the mystery of Plato about the cognition as “the remembrance of soul”. As if the soul of man at first lived separately from the body and had reached the whole wisdom of life, because the diseases and limits of body did not restrict the powers of knowledge. But because of sins gods joined it to the body and on the behalf of this union it forgot everything. Consequently “to know” now means only “to remember” what the soul knew already before joining to the body (1).

The works of the Lithuanian humanists of the 16th century witness that Lithuanian “soul” already in the 16th century knew practically the main principles of the concept of the legal state of nowadays and organized the relations between power and citizens according to them. Later, when the nation lost the state (when the soul of a Lithuanian was “joined” with the body of the occupant), it “forgot” this knowledge, so today we go to the West to bring back “the plan and building material” to create the state of law, though the not smaller spiritual values lay at hand, but only forgotten by us, castaway and buried in oblivion.

The Renaissance – invitation to increase the creation of values. The Renaissance was born in Italy in the 14th century (it reached Lithuania in the 16th century), and first of all it meant the turn back from the transcendental world towards itself, towards one’s life on earth and the welfare. When the man became concerned in this welfare more than in the salvation of soul, naturally appeared the question of the means of such welfare. The search of them stimulated the society to prepare more not for the war but for the creation of current values (culture) as for the life, which comes nearer to the existence of more effective and civilized man. So people began to consider the creation of values and the cultural activity of the society and every individual as the authentic calling of man and the source of his welfare, his social importance and his real rights.

Overwhelmed by this spirit the humanists of Lithuania mentioned above now could see danger for the nation not so much from the outside but more in the nation itself, in the not active enough cultural activity. They felt that Europe had come to the new stage of development of the new quality – not only military but also cultural competition between nations had begun, from the end of which eventually would depend also the fortune of the “competition” in the war field and the further lot of the nation. If up till now the nation

represented itself well in the field of culture, so what achievements it will show in other spheres of cultural activity? While thinking about this new approaching situation they tried to reach the three new points: 1) to stimulate their fellow partners to intensify their cultural creation; 2) to clear out what is the real subject of such culture and 3) what social, legal and organizational conditions are necessary to release and stimulate such creation as wide as possible.

Being lead by these intentions they criticized the noblemen of Lithuania for cultural passiveness (idleness), avoidance of war duties, hiring of warriors, violence, profanation of entrepreneurs etc.: "Our noblemen are not worried that our country is getting weaker and weaker because of lethargy, though they see that young people are much healthier undergoing service in the army than sitting at home (...), during scuffles in taverns more idle warriors die than enemies, who so often devastate our native country" (2). They encouraged stopping development of monasteries, which are not able to sense themselves culturally: "If the state is interested to make the number of idlers smaller, it must necessarily put to the end the growing number of monks and monasteries" (1). Everybody is invited to undertake the cultural activities, which are right to him, and by which he could become useful to himself and to his intimate people: "Who has the resources, he must go to study, who lacks them, let he works on the soil, goes to the army, or somehow else serves for his country" (2). Strykowski in one of his poems "The herald of goodness" (1574) stated that the real goodness can be achieved not by nobleness (blood relations), but by work and talent (3), e.g. by the more cultural efforts of the personality itself. In the historical epos "Radvilias" (1592) Jonas Radvanas also claimed that the Lithuanian rulers in the past tried to reach glory not through the blood relations with their honourable ancestors but by their personal deeds (4). Under the influence of such concept Strykowski derived our rulers not from farmers but from entrepreneurs (millers, masons, tailors, carpenters). This is the expression of the spirit of Renaissance, when the handicrafts were considered as a honourable occupation only because they are extremely important for the cultural progress of the nation. This is a particular opposition against the Second and Third Lithuanian Statutes, which proclaimed disrespect for handicraft. A little later (1651) the law professor of Vilnius University Aron Olizarowich stimulated noble youngsters in favour of the same handicraft in his book "About the political sociability", in which he invited to follow the examples of England and Scotland. On the basis of the influence of Cicero he criticized the prohibition in the Lithuanian Statutes mentioned above for the noblemen to undertake handicraft, as if it were not suitable and not honourable for their caste. The handicrafts themselves cannot be dishonourable, they become such only when they serve for the ugly exploitation (5).

For the purpose of stimulation of cultural activity Volanas even tried to create the new concept of nobleness and to relate nobleness not only with the natural heritage of the estate, which gives sanction for the cultural passiveness of the person, but more with the "smart works" of the person himself, which demand from the individual constant development of his personal physical and spiritual powers. He tried to prove that "it is better to be famous for one's own works done, than to use the good name of the ancestors (6). Not the estate must raise the person but the person must raise the estate. People are not born as noblemen but they become them. So those who "try to reach glory by smartness and honourable works must not be lazy and must not avoid work" (7).

Culturerological primacy of the individual demanded to pass from the organicistic concept of the society to the athrowic. This allegation of the cultural primacy first of all actualized the question, who is the real subject of such creation: the collective or the individual? The intuitional liking of the individuality forced Volan to evaluate critically the organicistic concept of the society, which was valid from the antique times, and which while stating the primacy of whole (state, caste, guild and the world-view community) gave the ideological sanction for the enslavement of the individuality by the collective power. Before that dominated the tradition of Aristotle and Thomas Aquinas that the society

consists of the organically bound castes, which fulfil the functions already fixed for everybody beforehand, which are obligatory in the existing of “the organism of state”. As well as these functions are eternal, the eternal are the corresponding to them castes and the legal position of the concrete individual fixed by the caste. The individual himself is only a separate specimen of the caste, who does not add anything essential to the quality of the estate. He is nothing to the caste, but the caste is everything to the individual: not the individual qualities of the personality or his cultural activity, but the passive dependence to the concrete caste from the day of birth determines the social importance of the individual: it exalts him without reason or degrades – in both cases the individual is liquidated as the subject of his own fate. So in this case we should speak not about the freedom of individual but about his obedience in fulfilling the obligations, which are submitted to him by the caste, and about subordination of lower links to the upper ones.

This view historically was inevitable till the states were not culturally orientated, till their task first of all was to fulfil military aggression or to repulse it. In the case of war masses and numbers (whole) act more effectively, in the case of usage of the creation of values – individuality. The direct creation is performed not by the caste but by the individual, because creation is the objectivization of the individual spirit, incarnation of it in the natural material and transformation of it into the tools of fixing of human existence. When the individuality was recognized to be the authentic subject of the cultural creation, it was necessary to acknowledge for it also the preference of value over generality (the whole). So Volanas looked upon social organicism as the ideological obstacle to entrench this priority in the practical human relations. He acknowledged that estates exist in the society, but he denied the priority of the estate and stated that the individual enters the concrete estate not by birth but more like being brought to it by professional deals. The estate for the person is not the priority but it is only the derivative – it is the union of practically free individuals, who are interested in their professional fortune. So the primary monad of the society are not estates (generality), but to some extent autonomous individuals, who want to look after themselves by their own creation (activities). Not the estate but the creation of the person, his quality and social activity now must determine the social importance (even nobleness) of the individual (1).

By this criticism Volanas expressed himself as the herald of the new capitalist order, and he did it much earlier than the philosophers of the new times Grocius, Hobbs, Locke and other ideologists of early capitalism.

Social atomism meant the new social methodology, which gave the priority in the human social relations not to subordination but to the relations of coordination. This way later brought to the idea, which was of essential importance to the state under the rule of law in the cooperation of social classes and social compromise, which namely meant the realization of the coordinative relations in social relations.

This methodological reorientation from generality to individuality was also felt in the works of Lithuanian historians of that time, when not only one of the first histories of state (Vijukas Kojelavicius) was written, but also the history of Lithuanian nation and the estate creativity of its separate members was created (Stryjkowsky). The same tendency of the awakening of the individualism was expressed in philosophy by the growing opposition of nominalism and empirism against thomistic “realism” of generalities and the primacy of speculative thinking.

The primacy of individual demands, the freedom of advertising and its evaluation.

After we recognized the cultural primacy of the individual against the collective, the demand appeared of the conditions and means, which could guarantee such a primacy; the first among them without any doubt is freedom. If somebody wants to create (act) by himself, first of all it is necessary to have the right (possibility) to do it. Only when we know these integral relations between independent creation and freedom, it is possible to understand

why the whole politicalology of Volanas is a certain hymn for freedom and for the means, which guarantee it.

Just exactly Volanas begins his main work "About the civil and political freedom" (*De libertate politica sive civili...*, 1572), written under strong influence by the ideas of Cicero, from freedom, which he puts on the very top of the pyramid of values. "Isn't freedom the best among all human matters?" (2) – asks the thinker, and answers next: "There is nothing what could be equal to the goodness of freedom in the life of mortal people" (3). Because freedom releases individual "for smart deeds" and consequently it fits best to the human nature and is the condition of "real life" (4). The philosophy blossomed so widely in ancient Greece only because Greeks were free people. The denial of freedom, as the elimination of man from his independent creation, according to Volanas, is "the worst of all evils", because "there is no possibility to do any smart job in slavery" (1). So he, together with Plato and Cicero, urged to value freedom more than life.

Real freedom is the rational freedom. Though Volanas values freedom most, but he does not overestimate it. His concept of freedom is not violated by the extremes of individualism, which became clearer in later centuries. In his concept freedom does not lose itself through the onslaught to become unruly. Namely the cultural-hermeneutical interpretation of freedom did not allow Volan to turn freedom into absolute. Freedom for him is not the value by itself, but only the means to undertake the independent cultural activities and to live "the valuable life" on this basis. What is more – is anarchy, the slavery of the weakest? Freedom for him is the process and because of it there is an internal contradiction in it: it does not only make free but also subdues. Volanas agrees with Plato that too big freedom grows into too big slavery, which destroys "the rule of the law of justice" and instead of it imposes "ugly supremacy of the lust of the heart" (2). Slavery can be introduced not only because of the lack of freedom, but also because of the excess of freedom. Those, who seek for the unlimited freedom can justly be proud not of honourable freedom but of the distorted image of it – violence" (3). The opinion itself that "freedom is the unlimited violence to do whatever you want" is stupid. So Volanas stimulates people to use freedom "rationally", e.g. to limit it by the right (freedom) of the intimate person. Rotundas also invited to use freedom rationally, who claimed that such freedom is the highest goodness (5). General conclusion was made that the sober limitation of freedom is not the demolishing of it but the humanization of it.

The necessity of laws comes from the necessity to curb freedom. According to Volanas, the humanization of freedom is possible only in the state or the society in as much as the public life is based on the agreement, according to which every individual refuses part of his rights in favour of the intimate person in order he could use safely the remaining rights. Law is only standard expression of this agreement: "only the power of law unites the crowd into the body of the nation" (6).

To humanize freedom means to save it from self-destruction, into which the freedom struggles by its will to be unlimited. Volanas looks for the means to limit freedom constructively in the notion of moderation formulated by Aristotle. Moderation must turn the freedom, which tries to reach absolute, into the relative freedom and this way to save it from the self-destruction. And this technical standard form, through which moderation comes straight to freedom, limits and culturalizes it, are the laws legislated by the state. They are created in order individuals could use their good without limiting the freedom of each other and "could curb the immorality and impudence of people", "set the limits of good behaviour" and "protect the universal quietness" (7). The laws come not to destroy freedom but to strengthen it, to guarantee, humanize: "there cannot be any freedom where there are no laws, or if they are arranged so that they support more than limit the violence of wicked people" (8). When there are no laws the right of strong people and "the cruel slavery of the weakest" is established. So the real aim of the laws is to insure freedom for all. And the freedom for all is "the just and allowed by laws use of all good without obstruction and fair to

meet injustice” (9). The freedom pulled into the form of law becomes the freedom of law, e.g. the relative (moderate), rationalized, culturally mastered, sociologized and because of this - freedom for all: in such a case freedom of one individual ends where begins the freedom of the other. Such freedom subjected to law serves to the welfare of all citizens and it is at the same time protected from self-destruction.

Leonas Sapiega also expressed the same ideas in the preamble of the Third Lithuanian Statute (1588): “The statute-book is made in order the powerful and wealthy could not violate, in order every jackanapes were curbed, in order everybody would stop from any kind of violence under the threat of law and would not be able to disdain and oppress those who are smaller and weaker than he” (1). Statute is the means, which must help in order the law would dominate against power and the freedom would become relative and humanized.

By this experiment to civilize freedom with the notions of moderation and law, the methodological devotion to the progressive antique tradition of Plato, Aristotle and Cicero was showed, which was extended by the contemporary concept of legal state into the notion of social compromise. The moderation or social compromise had to protect the society from the establishment of extreme political regimes and the revolutionary changes of the forms of state decided by them.

For the sake of moderation freedom in the Volanas’ interpretation, as we will see, everywhere is bound to the principle of law. So, according to this correspondence of freedom to the law, it can be divided into civilized (limited by law) and naturalistic, or the wild freedom (limited by power).

Concept of the just law. After we acknowledged “the state as being the preserver of general freedom” (2), we had to acknowledge also another truth that not by every law the state is able to do it, because as we have said, there are laws, which “are made so that they support more than curb the violence of the immoral persons”. So it is important for Volanas to estimate what features the law should be significant for in order it could really protect the individual from slavery and look for the common welfare of citizens, and at the same time “would not be considered by the illiterate people as the tool of slavery”. Volanas thought that such a law should be marked at least by such features:

1. According to its aim this law should strengthen in the society the rational freedom, safety of person and his property, “look for the use of all the citizens” and on this basis to support “the concord and peace among people” (3). Welfare and safety for all is the ultimate and authentic aim of this legal law. So “the castal laws”, which “serve more not for the growth of the welfare of people but for the taking out of the resources of lower classes” (4) Volanas does not consider as laws because they “are marred by the large and clear spot of slavery” (5). Practically it is criticism of the positive law of that time, which was based on privileges.

2. In order the law could reach this aim, first of all it is necessary to distinguish the law (lex) as the will of the state from the right (ius) as “the demand of wisdom”, as “the natural morality” and the natural and not distorted world order. “The demand of wisdom” is the understanding of morality, justice and welfare, which is arranged not by man but “fixed by gods into the human spirit” as the objective source and criterion of “the right law”.

3. In order the demand of state could get the status of law it must not contradict the mentioned above “demand of wisdom”: “who will call the matter, which contradicts the decision of human wisdom the law but not the tremendous and immoral crime, so it is stupid when it is decorated by the name of law” (6). The law contrary to “the demand of wisdom” would be not only stupid but also dangerous because “it would destroy the union of citizens and would seed the ugly mess and slavery among people”. So “[...] it is not possible to allow any concepts in the human community and those concepts cannot have the meaning of law, if they contradict justice, welfare and natural demand of wisdom” (7). The orders of the state, which are contrary to the reason, could not become “the constant

rule of life” because those acting, according to them, would perish sooner or later without the possibility to get accustomed to them. Illegal laws are disputed till at last they are recalled or their harmful effect is stopped by the national uprising. Consequently, if we are trying to come to real freedom and to the peace of life, nobody is allowed to bring anything into this life under the cover of law, to bring the matter, “which is not suggested by the wisdom itself and to which the right decision of mind does not show”. “The natural law is immovable and invulnerable”, which orders “not to harm anybody, to give everybody what belongs to him and to protect everything what belongs to us, and to turn aside the thoughts, eyes and hands of the stranger” (1).

When the will of power creates laws, it is already not sovereign but bound by the demand to honour the objective human values, which exist above the will of power and do not depend on its will. Those are the natural human values: life, health, honour, dignity, freedom, property etc. On the level of will they are natural rights, which were called by Volanas “natural law”, “the rule of good behaviour”, “God’s will”, “demand of wisdom”. When the king legislates the laws he must not make harm to these values. It means that the authority of law Volanas does not bind with the law itself (not with the will of the ruler) but with the correspondence of it with the right. When only the law is separated from right (from “the demand of wisdom”), the discreditation of it and the reincarnation from the protector of freedom to the destroyer of freedom begins.

Consequently rule, which is based on “the right law”, Volanas together with Aristotle consider to be from God, and the fault against it – savage. “When the law already does not have any importance for people [...], when the whole power is overtaken by the stupid human will, then [...] the unions of people are ruled not by God but by the wild beast” (2).

At that time this concept was the view of many Lithuanian lawyers and statesmen. It was expressed in 1564 by the secretary of Sigmund August Augustas Rotundas in his work “The talk between the Pole and Lithuanian” (1564), (“where there is no law and where the man but not right commands, it seems that the command comes from the wild beast”), later (1588) Sapiega wrote in the mentioned above introduction to the Third Lithuanian Statute: “Where the law and statute has the power, there rules the will of God itself” (3).

So we speak about the classical legal conception of law in Lithuania in the 16th century, which is practically described in the works of Plato, Aristotle and first of all Cicero. It makes the essential theoretical fragment of the contemporary legal state. The difference is that the classical legal conception of law did not formulate directly the demand of social compromise, though it was not difficult to come nearer to this concept through the already mentioned above notion of moderation and the inclination towards the law “welfare for all”.

From just law to the equality for all according to the law. Just law could have the meaning only in the case if every individual is recognized to be the owner of natural (integral) rights. If the laws must defend all, then those “all” must be recognized as the subjects of law and as such they must be considered equal vis-à-vis the state laws. From here appeared the earnest resentment of Volanas, Michalonis Lituanus, radical Arians and some Calvinists against the Lithuanian laws and the judicial practice of that time. Though it was fixed in the First Lithuanian Statute that “All our subordinates, the poor and rich, independent of their estate and origin, must be equally judged according to the written law” (The First Lithuanian Statute, chapter 1, article 9), but this “written law” judged persons from different estates according to different laws, punished them differently for the same violations of law, valued differently the life of people of different estates, fixed different duties for the state. Michalonis Lituanus resented that the same citizens but with different amount of property belong to different courts and that it is much more difficult to put the wealthy person on trial than the poor (4), “...often in the same cause one law is allowed for the noblemen, another for the town-dwellers and the third for farmers” (5). Only the town-dwellers and poor ploughmen must pay taxes to maintain the state, but “the big owners of land are bypassed, though they get much bigger profit from their domains...” (6).

The Lithuanian humanists of that time, and first of all the religious protestants, while criticizing this inequality of property demanded that all citizens of the Great Duchy of Lithuania should be judged according to the same laws of the state, and the punishment for the same crimes should be equal. They considered it the obligatory condition of freedom and humaneness. "Only in the state, in which the equal rights are used for all, citizens can be considered free people. If some of them have more rights than the others and cannot be punished, absolutely without fair of the laws can make harm to the lower classes, then the first [...] are dominating and the others are slaves. To present more rights or will for one group of people than for the others and not to make equal according to the same laws – must be allocated to inhumaneness and barbarian cruelty, but not to the order based on the right laws" (1).

The necessity to treat all the people equally against laws was based on two arguments. First was the concept of early Christianity: all "are born free". All people are the children of God, so among themselves they are brothers and equal. "Here there is no Jew or Greek; no slave nor free man..., - all you are one in Christ" (St. Paul 3, 28). The freedom of individual is his natural right. The rector of Vilnius University Petras Skarga considered freedom of the farmer villain "natural and Christian" (2). So in the Christian world there is no such a law, according to which one Christian man could make another slave. "All people are made of one blood, so they all are equal and brothers, and if brothers, then how one brother can have power against another? How he can live of his sweat?" (3). In 1569 in the Synod of Ivje the citizen of Vilnius Povilas from Vizna tried to prove that "to have power over the brother and to live of his sweat, or even more of his blood, is pagan" (4). It was discussed in Vilnius: "can those who don't release their farmers to freedom be allowed to the God's supper" (5).

This view in Lithuania of the 16th century was so widely spread, mostly among Protestants, that it can be found even in the testaments of some noblemen. Calvinist Sophia Vnuchkiene, the owner of Siluva, Pasusvys and other estates, while releasing to freedom her villains in 1593 condemned serfdom as the violation of "wrong Christians" against natural human freedom: "the loons turn free people into slaves and force them to serve them using violence" (6).

At the same time the inequality of property was criticized as contradicting to justice. Jokubas from Kalinovka considered the division of people into rich and poor as real but not right. So the duty of every man is to help that all people would become equal and all would live of their own work. (7).

The moderate Arians were nearer to the model of social relations, which were propagated by the state, who did not deny neither fortune nor power, did not demand to level the economical possibilities of all, but only stimulated the rich to behave more smoothly towards their subordinates, to give them some release and not to demand too much from them (8), e.g. they invited to acknowledge some rights of subordinates and to limit the rights of rich people and egoism towards them, and this way to diminish confrontation, to bring nearer the opposite sides for mutual respect and concord, in other words, the Arians invited for some kind of social compromise. Though here there is no refusal of the primacy of force, but at least we already can see desire to limit partially the force by law.

2. Already the origin of the state itself demands to treat all citizens equally towards the laws: "people created the civil society based on the laws, according to which equal conditions could have the mighty and the weak – rich and poor" (9). If their condition remains different then such a society will be nondurable and will perish under the internal disagreement and laceration.

Some evangelicals tried to give social meaning for the juridical equality. They propagated Christian socialism – common property and social equality (The Rakov commune), condemned any kind of exploitation (1), any kind of protection of the concrete

individual by law, which was not guaranteed by his work. Large inequality of property contradicts the law because it turns rights into privileges and on this basis allows for one person to fulfil aggression against the other according to the law. This way people are set apart and brothers are turned into enemies.

In spite of the utopism of programs the idea itself, which explains freedom as juridical and economical unity of its aspects, the outgivings against hypertrophied inequality of property today find the response in the concept of the social state of law.

The state is not the creation of God but of the public agreement. While stating the primacy of the individual and the ideal of the legal freedom (limited) appeared question of the state as the guarantee of all this. What country is able to do it? While looking for the answer it was necessary to look through the traditional theories, which explained the origin and destination of the state, because up till that time the theoretical explanations of these features of the state were added not to the individual but to the primacy of the estate (the whole). The state of Middle ages, as much as it acted on general interests, was called to bind the individual for the use of the whole, so the individual was more abused than patronized. The state appeared to him more or less like an alien and contrary to him force. Accordingly, the origin of it should be explained as independent from individual, created not by him and serving not to him, but like the weapon given from aside to enslave him.

At the same time, explaining the same questions from the point of view of the individual-centrism, the origin and destination of the state could become significant only if it served for the interests of the individual. And the state, which serves to the individual, already cannot be explained as having appeared besides the will of the individual.

So those who based their ideology on these ideas: Albertas Gostautas, Skorina, Michalonis Lituanius, Leonas Sapiega and others considered state to be not the creation of God but of the people themselves, also it was designed to save their natural rights (2). And the biggest work on this question was done by Volanas. The state appears not like the force dangerous for the individual, but like the organization to help him, State is “the civil union of the individuals”, which appears from the demand “to use the wisdom and help to one another” in order “having common life people could use peacefully and freely their own good” (3), in order “both weak and strong could use” the fruit of freedom”. It is “the way created by people to curb any kind of human wickedness and impudence”. Volanas used after Cicero even another term to name such a state: instead of “civitas” – “respublica”, he wanted to mark that state is “the business of citizens” (*res populi* or *res publicum*), e.g. created by citizens for their own benefit. It allows to think that Volanas maybe deliberately did not separate the notions of society and state, because when we link the state with the general welfare of citizens this difference becomes not the principle; in such a case the state is only the politically organized society or the self-service organization of citizens.

Image about the public agreement as the direct source of the state was taken by Volanas from the antique tradition of Epicurus, it seems that mediator was Cicero, though Luksaite points at the nearer sources of this idea (Morne diu Plesi XVI a.) (4).

Lithuanian humanists of that time had to explain also the reason of the historical degeneration of the destination of state: if the state by its origin is called to protect the natural rights of individuals, then why it goes against those rights? The Lithuanian Arians: Jokubas from Kalinovka, Povilas from Vizna, Lukosius Mundius and others derived such a state not from the public agreement but from the “bad man” and from his illegal violence: “Brother, you cannot contradict me that the domination over other people began from the angry man, who is called by all people the Tyrant... The tyrant Nemrot first of all turned people into slaves, ruled over them and most probably forced to work for him” (1).

While deriving the state from “the bad man” the reformers demystified power and this way created conditions to rule it using the safety interests of human rights. The citizens of demystified power stopped being afraid because fighting against the violation of power already did not mean fighting against the God’s will. It is the division of politology from

theology and at the same time the attempt to increase the social consciousness of people and political activity in defending their own rights.

Together with the primacy of individual the consciousness of the value of human rights was formed and also the legal mechanism of their protection.

The rule of king is not to destroy the freedom, but to protect it. While propagating the notion of legal law Volanas created the strong methodological basis to distinguish the legal power from illegal, correspondingly – royal power from tyranny, and on this basis he managed to ground the positive meaning not only of the royal power but also of general power of the state for the present and future. Liberals of the 19th and 20th century (Sorel, Stirner, Tolstoy and others) did not distinguish the violate state power from the legal one, so they could see in the state only the spontaneous evil. This anarchic tendency showed its vitality already in the 16th century. Radical Arians propagated it very distinctly identifying the state with the illegal violent institutions and consequently they stimulated “real Christians” to avoid the state duties altogether, which stimulate violence and realize it. From this came the movement of “knights of wooden sword”.

This non-historical and suicidal “Renaissance liberalism” was alien to A. Volanas. Just like many thinkers of Renaissance Volanas did not want to liquidate the state, but only to change the meaning of it and “to order it well” in order it would serve not for the caprice of the ruler but for the rights and freedoms of people. The power of the state, just like it stood on the side of violence, now must pass to the legal side. So to strengthen the state means to increase its ability to defend law. He does not agree with the opinion that the institution of king never decides right and well, that it does not follow the demands of reason, that the ruler always behaves only according to his whims and has power only “to press the innocent and to leave the guilty unpunished”. On the contrary, towards the institution of king Volanas looks as at the necessary guarantee of the rule of law: the royal power as legislator “limits the criminal acts, which make harm to the other people” (2), and when it forces to preserve the laws, it forms respect to the laws in human minds and this way it makes the man free. There is no freedom without respect to the laws. To base it he quotes the saying of Cicero: “we are the slaves of the law in order we could be free”. But this respect to the laws as well as to the limited freedom comes not by itself but because of the king’s power, which implants this respect through the organized power. If the power of king were refused and if all the people were made equal “people would not be able to agree with such a situation when the yoke of law is put on them” (3). Obedience to laws, which is guaranteed by the king’s power, according to Volanas, is not slavery. The state and legal laws in this case are united by the obligatory inner links.

Antipathy to the king’s power according to Volanas has appeared not because of the fact that the royal rule is bad in essence, but because of the passing historical reasons: 1) because of the direct democracy of ancient Greeks and Romans, and 2) because of the violence of rulers against their subordinates “when the decisions instead of laws or the wayward decisions of the king or the laws themselves were adopted sooner for the whim of the king than for the use of citizens” (4). According to Leonas Sapiega, it was the case in the past also with the rulers of the Lithuanian-Polish state, when “the king pursued his power over people not on the basis of the written law or Statute, but only by his own opinion or will”. Because of this he “often turned away from his duties and bothered more about his own but not about the common welfare”. Because of this “people felt disgust in the power and superiority of kings and called them not rulers but tyrants” (5).

According to the violent law the behaviour is typical not to the king but to the tyrant. The king acts not by his own will but according to the law, which preserves the good of all people. According to Rotundas “let the king rules but let nobody rules the king, only God and law; he [the king – A.V.] must know what the God asks and what the law teaches” (1). But such a king bound by law is not a tyrant but “the norm of right and moral life” (2). His power bound by legal laws is not dangerous for the citizens and so is not objectionable:

“Nowadays, when the king of people has become only the law and people are not the tyrants of laws, the royal rule does not deserve any reproach or hatred” (3). As an example of such royal power he shows the Lithuanian-Polish state: “The royal power in our country is constricted by grips strong like bit and it cannot legislate any laws without the agreement of the nation, neither to change anyhow the already passed ones. Before beginning to rule the state at the beginning of reign they [kings – A.V.] must swear to the nation that they will not do anything and ever against laws. If it happened, they clearly confirm that such decision will not have any legal right, because it would be done against the sacred belief and the oath” (4). The law is “the ruler of all citizens and king” (5). Leonas Sapiega thought that the noblemen of Lithuania can be proud against the other Christian nations already by the fact that “we don’t have the lord above us, who would be bound not by our rights but by his will. The one, who would want to violate against us according to his whims but not according our rights, he would not be our lord, but only the violator of our rights and freedoms, and we would become his prisoners. Neither neighbour or the citizen, but also our ruler has superiority over us, but only as much as it is allowed by laws”. This is a huge “treasure, which cannot be bought by any money” (6).

These reasonings meant the idea of the aristocratically understandable national sovereignty and its superiority over the sovereignty of state. The power of the ruler in Lithuania comes not through heritage but through the will of the nation (nobility): nobody is born here a king or a ruler, but they are elected at the common vote of noblemen” (7). But if so, then the power, which has been got this way, comes not to rule over the nation but to serve it?

This tendency to show royal institute not as the destroyer of freedom (the law) but as its protector, was important not only under the conditions of that time but also later, because the growing wave of liberalism weakened the executive power as the guarantee of the reality of laws, and because of this it made the demand of reign only the declarative factor. The results of this double ideology in the 18th century Lithuanians could test by their fate.

The fact that in Volanas attitude towards the state there is no liberal mentioning about the state as a disaster for individual, can be explained by the influence of the antique tradition. Plato and Aristotle tried to prove that from the cultural point of view the man is not enough for himself, so the help from the other individuals is necessary. And this mutual support is embodied in the state, which organizes and guarantees this support. Volanas manages to combine the state and the freedom of individual also because of the fact that he manages to combine freedom and moderation, and on this basis – personal and public interests.

Fight against the abuse of violence absolutely refusing violence. When Volanas managed to make sense of the state from the legal point of view, he managed to do the same with the violence on the side of the state. In general he is not against violence only because he, as we have seen, distinguishes king from the tyrant, and the legal force from the illegal violence. This was his contradiction against the Lithuanian Arians of that time, who condemned the violence absolutely, as totally unacceptable for “the real Christian”. The resentment against the illegal use of force (because of its overwhelming amount) then had become undialectical and because of this disastrous refusal of force. They thought that the evil is in the force itself but not in its aims. Because of this they had a slogan “not to resist against evil by force” or “win the evil by kindness” (St. Paul). Arians did not look for the relations between force and law and this way they lost the method to understand it. Constraint together with law must be understandable and the real danger to human rights and because of this – absolute evil. But if we refused this constraint absolutely then we would have to refuse also the positive law, because without constraint the law is only a moral norm, the fulfilment of which could be guaranteed only by the good will.

Being loyal to their primary suppositions radical Arians stimulated their congenials not to take sword into their hands, not undertake any state duties, which allow the sword law

(the right to punish – voivode, locative, etmon, judge, soldier etc.), not to participate in wars, not to use force even in the case of defense (Czechowic, 1575) (1).

In as much as such ideas could not involve the whole society, practically they turned into the stimulation of the same force, but already illegal and the capitulation against it. So not occasionally the Lithuanian power was forced to use constraint against those who proclaimed non-violence (in 1658 Arians were driven out of Lithuania).

The society of that time was not yet prepared for the way of life without constraint, as well as it is not prepared for it at the end of the 20th century. The misuse of force (constraint) is not the argument to refuse force, just like overeating is not the argument against food in general. The problem is not the constraint itself, but it depends for whose interests and rights or non-rights it is used. Without constraint there is no law as the obligatory universal rule of behaviour. When we say: the law is more than morality, then this “more” is nothing else than the imperativeness of a rule, which is guaranteed by constraint. The concept of the state of law does not refuse constraint absolutely, but only the illegal constraint. The force will have to stand on the side of law till the force will stand on the side of injustice, till there will not be enough of the voluntary surrender to its imperatives for the functioning of law.

When the radical reformers divided constraint from law, they became unable to understand neither one nor another.

The king misuses power if the nation or the civil social idea allows it. From the point of view of legal state the fact was valuable in the Volanas views that he not only formulated the conditions of legitimation of royal power, but he also showed the reason, which allows the royal power to degrade into tyranny – to turn the legal force into illegal. The main reason of such transformation is “the weakness of those who allow to do so, don’t stop him (the ruler – A.V.)” (2). Those, who don’t dare “to stop the lusts of the ruler”, are called by Volanas “cowards and weak-willed”, and the nations – “bleak and uncultured” (3). Such a nation is our neighbour – Moschovitians, which not only tolerates the misuse of power by Ivan IV against themselves, but even calls it “the God’s law” (4).

Volanas tried to prove that the necessity of the active position of citizens comes from the recognition of the superiority of law. Where such superiority is recognized the citizens must be politically active, they themselves must look after the justice and undertake the responsibility for the outcome, which are made by the activities of the ruler against law. If the ruler breaks the laws and the citizens do not oppose it, then they are also guilty for it (5). This way the circle of the subjects of political responsibility is widened, the ruler is fostered by the spirit of the honour of the fixed order of the law, the citizens themselves engage into the protection of their rights and become not subordinates but real citizens, e.g. responsible for their own actions and the actions of the state (power).

Connection of the superiority of the law with the necessity of the active position of citizens is the big merit of Volanas in the creation of civil society (*societas civile*) and the conception of the state of law. While expanding this idea he proceeded the antique stoic tradition, according to which the citizens are stimulated to take active part in the handling of the state as the organization of the protection of the rights of the people. The same is repeated in the conception of legal state today: the superiority of law anchors in the relations between power and citizens not like the result of the consciousness of power and good will, but like the result of the active fight of citizens for their rights.

Content of the legal doctrine is the legal statehood. While resuming the views of A. Volanas and other Lithuanian humanists of the 16th-17th centuries we must say that the Lithuanian legal doctrine, formulated by them, practically had the meaning of the state of law: it based the legal values, which were typical for the capitalist – future societies, distinguished clearly justice from law and on this basis formulated the legal concept of law, originated the state from the public agreement and explained it as the protection of common use of citizens and freedom. There was a tendency to look at the state power as the institution of social service; only the rational freedom was considered authentic, the

expression of rationalism of it were the legal laws. To fulfil the latter and to guarantee their reality the strong royal power was demanded. In order the power would not misuse its authority and would not become dangerous for the rights of citizens it was suggested to limit it by "the right laws" and active defense of citizens, which would not tolerate the license of the ruler against their rights.

In honour of Volanas we must say that these ideas, which make the content of the concept of the state of law nowadays, he formulated much earlier than Hobbs, Locke, later Kant, Heggel and others, who officially in the West are considered the beginners of such a concept in Modern time. The works of Volanas quite legally can be included not only into "the golden fund" of the Lithuanian legal politological thought.

The progressiveness of the Lithuanian legal doctrine of the 16th century was determined by the fact that its authors referred to the methodological principles of the concept of statehood of Plato, Aristotle and first of all Cicero, in which the ideas of antique democracy and early Christian humanism were materialized.

Many of these ideas did not remain only the theoretical facts, but found their standard fixation in the Lithuanian Statutes, which will be described in the other article.



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