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ROLE OF CONSTITUTIONAL COURTS IN PROTECTION OF NATIONAL/CONSTITUTIONAL IDENTITY

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Role of constitutional courts in protection of national/constitutional identity

1. National or constitutional identity?

During the 19th Century the problem of nations and national identities was attached to the fight for national independence, for aspiration to establish or re-establish a national state. Thus the sociological interpretation was transformed into legal debates as interpretation of sovereignty and citizenship. In this period constitution meant both fact and law. Fact as the political and institutional tradition of a state or of a part of its people and law as the legal imagine of the political tradition. Hence the written (charter) constitutions were not usual in Europe not a specific legal formulation but a shorter or longer set of laws was understood when the constitution was mentioned – together with the circumstances of their origin and history. This concept of the historical constitution meant the past and it had effect on present and mostly on the future as a reference for legitimacy of a certain political aim. Consequently the nation and national identity played the primary role, and the constitutional tradition – if it existed at all – served only as its legal background.

Of course, this interpretation does not mean that the constitutional tradition was not important. Just contrary, we know several states that could reestablish their sovereignty – even repeatedly – based on their strong and emotionally defended constitutional tradition. Without the Golden Liberty or the Noble's Democracy Poland could hardly have been reestablished after its destruction in 1772-1795, in 1815 or in 1939. The role of historical constitution was the same for Hungary: it helped us to survive the Turkish conquest for 145 years, the re-conciliation with Vienna. And of course, neither Warsaw nor Budapest could have restored democracy and rule of law in 1989 without our constitutional heritages as legal and legitimate foundation.

2. Rule of law as role of law

During the 20th Century the legal aspects of constitutions grew above the idea of national identities. After the Firs World War the political map of Central Europe was completely changed and after the collapse of the former empires a compelling need for new constitutions awakened. The national identity and sovereignty of the national states was expressed by the new, written, charter constitutions. This move of emphasis from the sociological to legal interpretations, from national identity to constitutional legality was – at least within the happier half of Europe – completed after the Second World War. In the pursuit to overcome the horrors of the previous years and to keep peace, security and wellfare the West had focused on cooperation, on multilateral international or supranational organizations and treaties, on legal safeguards and not on political will based on national identities. In our region the long grizzle of bolshevik oppression precluded any form of reference to national identity.

Of course in Central Europe the notion of constitutionalism was also forbidden. Thus the transition of the '90s meant for us not the simple turn back to the national and constitutional heritage abandoned unintentionally after the Second World War but it brought adoption of the approach and wording of the West. We joined the Council of Europe, the Venice Commission, later the European Union and we faced the highly appreciated role of law, the estimation above all of the rule of law. And what more, we had to comprehend and to accept the new significance of national and international courts in the protection of the rule of law.

3. Ages of rule of law – from legislative to judicial states

The new, internationalised concept of rule of law is a mixture of the French, English and German approaches of constitutionality, of rule of law and of Rechtsstaat and it gives a unified answer to the fundamental question of limiting the exercise of state-power. With radical simplification, it can be argued that the French tradition gave the institutional solution (distribution of powers), the English response held the procedural aspect by the principle of legal dispute before an independent court of law, while the German argument was that the substantive rights and freedoms are indispensable.

Development of the principle of rule of law has its intrinsic legal history. The 19th century was the age of great codifications. There was no doubt that since the Middle Ages there were endeavours to collect and systematize the norms regulating the different legal relationships – such as the Decretum Gratiani, the Sachsenspiegel or the Tripartitum Consuetudini Regni Hungariae by Stephan Werbőczy. However, the codes redacted through considered principles and consistent dogmatical background had started with the Napoleonic Code Civil, the Austrian Allgemeines Bürgerliches Gesetzbuch, the German Bürgerliches Gesetzbuch. We can say that during the 19th Century rule of law was determined by the primacy of legislation. With the philosophical and scientific positivism in the background the legal sources discussed and codified by the legislative Parliaments seemed to be suitable antidote against random choice of arbitrary decisions.

This stage of legal development was overtaken by the 20th century bloody disintegration of empires. In Austria the Constitutional Court imagined by Kelsen seemed to be an appropriate tool, which later has been spread to many countries of Europe as a continental model. As it was demonstrated by Professor Béla Pokol in Hungary about a quarter of a century ago the constitutional judiciary in the 1920s could not be entrusted to ordinary courts. It could not be expected from judges of ordinary court to base their judgments on a revolutionary, abstract constitutional charter instead of the prestigious codices with unquestioned respect. That was why an independent constitutional court was needed. Kelsen's truth in this respect is confirmed by the fact that the (ordinary-type) German Imperial Court was inadequate to protect the Weimar Constitution, whilst the new-type Austrian Constitutional Court was more efficient until the Anschluss.

The model of rule of law protected by court jurisprudence proved to be appropriate not only for other countries but also for other periods. It was more than a simple coincidence that after the dictatorships so many countries have established Kelsen-type constitutional courts to restore the rule of law. But these dictatorships – in Western Europe in the first half of the twentieth century, in central Europe until the 1989–1990 transitions – were constructed on the primacy of the executive power. Therefore, in the new systems, constitutional jurisdiction was necessarily focusing on the limitation of the executive, with strong emphasis on the principle of rule of law, not only on formal conformity of the acts of legislation with the constitution.

Assignment of consideration of the rule of law to the courts was, of course, a serious guarantee, enforceable court rulings guaranteed the respect of this fundamental principle. At the same time, the free interpretation by the courts was practically unlimited, unrestricted. Enforcement of the legality and of legitimacy, both of them considered theoretically components of the principle of the rule of law became asymmetric, legitimacy was in an increasing scale displaced by the legality (constitutionality) from the principles to be taken into consideration in the every-day-interpretation of the constitutions. The concept of separation of power perceived two of the traditional branches of power as guarantors of constitutional requirements: the Parliament as legislator ensures legitimacy, and the courts control the legality of activity of the Executive

through their judgments. Overshadowing the value of legitimacy was thus a matter of contesting the importance of Parliaments.

The courts entrusted with the power of deliberation of final and unquestionable decisions are not just for individual disputes, but the courts are also final supervisors of the Executive or, in the broader sense, the decisive and exclusive supervisors of the entire government activity. Thus legality remained the single substantial rule, and both the Legislation and the Executive is ultimately subordinated to abstract interpretation of law. Of course, this happens neither due to the rule of law as an ideal, nor due to the requirement of legality. Rather, it is about replacing the ideal of the rule of law with the absoluteness and exclusivity of the principle of the rule of law.

4. Courts judgments on "common European tradition" and on national/constitutional identity

If the two above-mentioned phenomena, namely emphasis on international cooperation instead of national identities and development of the judicial rule of law replacing the legislative Rechtsstaat are examined together, it will not be surprising that the role of courts was increased and the new legal terms as common European tradition and constitutional identity appeared firstly in judgments.

The starting shot came from the European Court of Justice (ECJ) in *Internationale Handelsgesellschaft* (Case 11-70). The Court used the new term of "constitutional traditions common to the Member States" with focus on the common and homogenous protection of human rights. As the danger of overcoming the constitutional judicature of the member states was quite clear and present, the answer did not delay. The German Bundesverfassungsgericht reacted in 1974 with *Solange I* based on the Grundgesetz, namely on its eternity clauses stated that community law, consequently the common constitutional traditions protected by the ECJ does not have priority over the protection granted by the Grundgesetz and protected by the German courts. In this way Solange I tried to go against the international common traditions by highlighting the role of national constitutions. The quiet battle was going on for decades. Solange II, Solange III and many other cases were the nodes of this tug of war. Finally The Treaty on European Union tried to give a peaceful equilibrium.

On one hand Article 2 of TEU identifies common values of the member states, as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Article 6 mentions fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the well known constitutional traditions common to the Member States. On the other hand Article 4 rules that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

5. Constitutional courts as developers of balance

What are the consequences of the TEU regulation? On one hand it means that common traditions as international or supranational values will be protected later on by the ECJ which perhaps will maintain the primacy of the EU law against national constitutions. But on the other hand just the TEU gives a strong background for the standpoint that the common European constitutional heritage must not be opposed to national constitutional identity and vice versa. The two set of values should be equilibrated.

It means that constitutional identity of the different nations cannot be dissolved in an artificially constructed common imperial formula. The common values contain what is common, the

national values cover what is not common. But values that are not common are also values and these values also need legal protection. If constitutional identity disappears, the common part also loses its importance, it will be reduced to a mere imperial order.

From institutional aspect this means that if the common European heritage is developed and protected by international and supranational courts, the ECJ and the ECtHR, the equilibrium needs a similar court protection. This protection is vested in the constitutional courts of the member states of the CoE and the EU. Thus the constitutional courts may have different tasks but their primary mission is protection of their own constitutional identity. This is not only national but – if we accept the regulation of the TEU – it is also a European mission. Yes, even if it looks strange, protection of constitutional identity is a common European mission of the national constitutional courts.

The path was shown by the German Bundesverfassungsgericht in the Solange decisions, and many of the constitutional courts made their contribution to fulfil this mission. Examples may be decisions of the Supreme Court of Estonia stating that "independence and sovereignty of Estonia are timeless and inalienable" (Cp. Judgement No. 3-4-1-6-12. (12 July 2012), paragraphs 128 and 223). Decision of the French Constitutional Council ruling that "the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto" (Cp. Decision No. 2006-540 DC of 27 July 2006). Decision of the Constitutional Court of Poland saying that "accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland. The norms of the Constitution, being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere fact of an irreconcilable inconsistency between these norms and any Community provision" (K 18/04, 11 May 2005). The Constitutional Court of the Czech Republic (in its judgement No. Pl US 50/04 of 8 March 2006) refused to recognize the ECJ doctrine insofar as it claims absolute primacy of EC law. It stated that the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of State sovereignty of the Czech Republic.

The Hungarian Constitutional Court tread on this path by its decision 23/2016. (XII. 5.) AB stating that it "interprets the concept of constitutional identity as Hungary's self-identity". "The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today (…) These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon. (…) The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State."

I hope that our constitutional courts are ready to serve this equilibrium and they will not exchange their primary mission to protect national identity with their other tasks originated from this mission. In conclusion I can repeat only a citation from my closing remarks delivered last year at the end of the Budapest Congress of *Fédération Internationale pour le Droit Européen.* Citation from a great personality, a great European, a great Polish patriot, Pope Saint John Paul II as expressed in Santiago de Compostella, more than thirty years ago: "I ... issue to you, old Europe, a cry full of love: Find yourself… Be yourself. Discover your origins. Give

life to your roots. Revive those authentic values that gave glory to your history and enhanced your presence on the other continents… You can still be the beacon of civilization and stimulate progress throughout the world.'"

Our future depends on willingness of – at least – our constitutional courts to hear this admonition. Otherwise Europe will no longer be united in diversity but only homogenised in a new grizzle.