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19 Role of Constitutional Courts in the Protection of National/Constitutional Identity

András Zs. Varga[*]

19.1 National or Constitutional Identity?

In the 19th century the problem of nations and national identities was related to the fight for national independence, the aspiration to establish or re-establish a national state. The sociological approach to the phenomenon was therefore transformed into legal debates surrounding the interpretation of sovereignty and citizenship. In this period, the constitution was both fact and law. It was a fact in the sense that it represented the political and institutional tradition of a state or a part of its people, and law as the legal reflection of that political tradition. Hence, written (charter) constitutions were not customary in Europe. Instead of a single legal document a few or an ample set of laws were understood under the term constitution– together with an understanding of the nation's origin and history. This concept of historical constitution referred to the past, with an effect on the present and in particular, on the future as a source of legitimacy underpinning a certain political aim. Consequently, the nation and national identity played primary central role, with the constitutional tradition – if there even was such a thing – serving merely as its legal background.

Of course, this interpretation does not mean that the constitutional tradition was not important. On the contrary, we know several states that were capable of reestablishing their sovereignty – even repeatedly – based on their strong and passionately protected constitutional tradition. Without Golden Liberty or the Noble's Democracy Poland could hardly have been reestablished after its destruction in 1772-1795, 1815 and 1939. The historical constitution played the same role in Hungary: it helped us survive the 145-year Turkish conquest, as well as the re-conciliation with Vienna. And of course, neither Warsaw, nor Budapest could have restored democracy and the rule of law in 1989 without our constitutional heritage as a source of legitimacy and as a legal foundation.

* András Zs. Varga: professor of law, Pázmány Péter Catholic University, Budapest; judge, Constitutional Court of Hungary.

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19.2 Rule of Law and the Role of Law

In the course of the 20th century the legal understanding of constitutions grew beyond the idea of reflecting national identities. After World War I, the political map of Central Europe was completely redrawn and following the collapse of the former empires, a compelling need for new constitutions emerged. The national identity and sovereignty of nation states was expressed through new, written, charter constitutions. This shift of emphasis from the sociological to legal interpretations, from national identity to constitutional legality was – at least within the Western part of Europe – completed after World War II. In the pursuit to overcome the horrors of earlier years and to uphold peace, security and welfare, the West focused on cooperation, multilateral international or supranational organizations and treaties, on legal safeguards and not on political will stemming from national identities. Meanwhile, in our region, the persistent horrors of bolshevik oppression precluded any form of reference to national identity.

In Central Europe, the notion of constitutionalism was naturally also forbidden. In consequence, the transition of the 1990s meant more than a simple returnt to the national and constitutional heritage abandoned unintentionally after World War II: it also brought with it the adoption of the Western approach and constitutional language. We joined the Council of Europe, the Venice Commission, later the European Union, organizations highly appreciating the role of law, and placing above all of the rule of law. What's more, we had to comprehend and to accept the new significance of national and international courts in the protection of the rule of law.

19.3 Generations of the Rule of Law Concept – From Legislative to Judicial States

The new, broadly accepted concept of the rule of law is a blend of the French, English and German approaches to constitutionality, the rule of law and the Rechtsstaat. It gives a single 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 approach stressed the procedural aspect by formulating the principle of adjudicating the legal dispute before an independent court of law, while the German rule was that substantive rights and freedoms are indispensable.

The development of the principle of the rule of law has its own intrinsic legal history. The 19th century was the age of great codifications. There is no doubt that since the Middle Ages there were endeavors to collect and systematize the norms regulating the

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different legal relationships – such as the *Decretum Gratiani*,[1] the *Sachsenspiegel*[2] or the *Tripartitum Consuetudini Regni Hungariae* by Stephan Werbőczy.[3] However, codes redacted on the basis of considered principles, boasting a consistent dogmatical background only emerged with the Napoleonic *Code Civile*, the Austrian *Allgemeines Bürgerliches Gesetzbuch*[4] and the German *Bürgerliches Gesetzbuch*. We can say that during the 19th century the rule of law was defined by the primacy of legislation. The philosophical and scientific positivism underlying the legal sources debated and codified by Parliaments seemed a suitable antidote against the randomness of arbitrary decisions.

This stage of legal development was overtaken by the 20th century: the bloody disintegration of states (empires) and birth of new states. This social process brought with it the need for the legal organization of the new states, fulfilled by the adoption of charter-constitutions.[5] The new charter-constitutions needed enforcement. In Austria, the Constitutional Court conceived by Kelsen seemed to be an appropriate instrument, adopted by several countries of Europe, becoming the continental model.[6] As pointed out by Professor Béla Pokol about a quarter of a century ago, in Hungary constitutional review could not be entrusted to ordinary courts in the 1920s.[7] It could not be expected from judges of ordinary courts to base their judgments on a revolutionary, abstract constitutional charter instead of the prestigious codices of unquestioned repute. That was why an independent constitutional court was necessary. That Kelsen was right in this respect is confirmed by the fact that the (ordinary) German Imperial Court was unable to protect the Weimar Constitution, whilst the new Austrian Constitutional Court was more efficient until the Anschluss.[8]

As a temporary phenomenon, the period of the rule of law entrusted to the executive power between the two world wars should be mentioned. The age of great codices and of the traditional imperial-states broken by emergence of new states and the shock of economic crises, increased the demand for an efficient executive power. This took on a

1 Szabolcs Anzelm Szuromi, *Medieval Canon Law. Sources and Theory,* Budapest, Szent István Társulat, 1998, pp. 36-46.
2 Eberhard Freiherrn Künssberg, *Der Sachsenspiegel. Bilder aus der Heildelberger Handschrift*, Leipzig, Insel-Verlag, 1933.
3 Gábor Máthé (ed.), *A magyar jog fejlődésének fél évezrede. Werbőczy és a Hármaskönyv 500 esztendő múltán.* Budapest, Nemzeti Közszolgálati Egyetem, 2014.
4 Wilhelm Brauneder, 'Das ABGB Als Kodifikation Für West- und Osteuropa', in: Gábor Béli, Diana Duchonová, Anna Fundarková, István Kajtár & Zsuzsanna Peres (eds.), *Institutions of Legal History with Special Regard to the Legal Culture and History,* Pécs, Faculty of law, University of Pécs, 2011, pp. 127-135.
5 Kálmán Pócza, 'Alkotmányozási eljárások összehasonlító elemzése', in: András Jakab & András Körösnyi (eds.), *Alkotmányozás Magyarországon és máshol.* Budapest, MTA TK PTI – Új Mandátum, 2012, p. 123.
6 Péter Paczolay (ed.), *Alkotmánybíráskodás. Alkotmányértelmezés,* Budapest, ELTE, 1995.
7 Béla Pokol, *A magyar parlamentarizmus,* Cserépfalvi, Budapest, 1994. pp. 35 and 94-95.
8 Maartje de Visser, *Constitutional Review in Europe. A Comparative Analysis*, Oxford and Portland, Oregon, Hart Publishing, 2014, p. 63.

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different form overseas (New Deal)[9] and in Europe (authoritarian, fascist regimes).[10] Although not without exception (in the United Kingdom or in France respect for constitutional principles did not disappear), but in general, during these decades the rule of law was not respected in Europe. Law became a mere instrument in the hands of the government not unlike in absolutistic states, in stark contrast to constitutional states.

The model of the rule of law protected by courts proved appropriate not only for other countries but also for other periods. It is no coincidence that following dictatorships so many countries 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 hinged on the primacy of the executive power. Therefore, in the new systems, constitutional jurisdiction necessarily focused on the limitation of the executive, with a strong emphasis on the principle of the rule of law, not only on formal conformity of legal acts with the constitution.

Assigning the 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, free interpretation by the courts was practically unlimited, unrestricted. Enforcement of legality and legitimacy, both considered to be theoretical components of the principle of the rule of law became asymmetric. The role of legitimacy was in an increasingly displaced by the principle of legality (constitutionality) of in the routine interpretation of constitutions. The concept of the separation of powers 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 the executive through judicial review. Overshadowing the value of legitimacy thus meant contesting the importance of Parliaments.

Governmental activity is carried out by the third branch, the executive power.[11] This branch functions properly if it is legitimate and if functions lawfully: its actions must be legal and must not be contrary to the will of the public. But legitimacy and legality of the executive power is not sufficient on the long run, since it has the role of enforcing laws and implementing the will of the people. Efficiency and effectiveness is therefore a third measure of the executive. Therefore, if we want to summarize the requirements of a constitutional state governed by the principle of the separation of powers, we cannot ignore the three measures of legitimacy, legitimacy and effectiveness. All three are appli-

9 Paul Johnson, *Modern Times: A History of the World from the 1920s to the Year 2000*, Orion, 2013, pp. 289-292.

10 Id., pp. 389-398.

11 Paul Craig & Adam Tomkins (eds.), *The Executive and Public Law. Power and Accountability in Comparative Perspective*, Oxford: Oxford University Press, 2006, p. 5; Martin Loughlin, 'Constitutional Law: the Third Order of the Political', in: Nicholas Bamforth & Peter Leyland (eds.), *Public Law in a Multi-Layerd Constitution,* Oxford and Portland, Oregon, Hart Publishing, 2003; Adam Tomkins, 'The Struggle to Delimit Executive Power in Britain', in: Craig & Tomkins 2006, p. 16; Ernest A. Young, 'Taming the Most Dangerous Branch: The Scope and Accountability of Executive Power in the United States', in: Craig & Tomkins 2006, pp. 164-170.

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cable to the executive: if the executive wants to function properly it must act legally (subject to judicial control), it has to take into account the legitimate will of the people (expressed by the Parliament) and it should be effective (otherwise it will lose its support despite its formal legitimacy and legality).

The executive should be effective, but in constitutional governments based on the rule of law, the relevance of legality becomes overwhelming, with courts or constitutional courts capable of expressly blocking the executive's effectiveness. In other cases, the aspect of legitimacy is ignored. The explanation is quite simple: the courts entrusted with the power of handing down final and incontestable decisions are not just fora of individual disputes. They are also final supervisors of the executive branch or, in a broader sense, the decisive and exclusive supervisors of all government activity. If courts and only courts exercise control over the executive and the Parliaments, other aspects of responsibility and accountability, such as political rationality, economic utility or social acceptance are of only secondary importance.[12] Thus, legality remains the single substantial rule, and the executive is ultimately subordinated to an abstract interpretation of the law. Of course, this is not a necessary consequence of the rule of law as an ideal, nor of the requirement of legality. It is much rather an attempt to replace the ideal of the rule of law with the absoluteness and exclusivity of the *principle* of the rule of law.

In parallel with the development of states, the the middle of the past century saw the establishment of strong international and supra-national institutions: the United Nations, the Council of Europe, and later the European Communities, the latter becoming the European Union. The efficiency of the new supranational institutions was guaranteed through the creation and operation of inter- or supranational courts independent from the Member States (The Hague, Strasbourg, Luxembourg). These powerful supranational organizations however, were but mere legal communities, their founders, the member states could only lend them legal frameworks, and not political or social values. This led to a situation where powerful supranational courts could only consider in their decisions their own substantive law and no other value. These courts have significantly shaped the interpretation of the substantive law in question, exerting a strong influence on the legislation and jurisdiction of their Member States. As an illustrative example for the benefits of free judicial interpretation is the jurisprudence of the European Court of Justice and the *Van Gend en Loos* case (1963). This decision has declared the primacy of European Community law (now European Union law). As a consequence of the principle of primacy, political accountability remains the 'burden' of the Member States, but the freedom of their legislation has strongly decreased. Hence EU law has become enforceable without limitations through integrationist judicial control.[13]

12 Carol Harlow, 'European Governance and Accountability', in: Bamforth & Leyland 2003, pp. 79-102.

13 Harlow 2003, pp. 95-96, Paul Craig, 'The Locus and Accountability of the Executive in the European Union', in: Craig & Tomkins 2006, pp. 329-343; Neil MacCormick, *Questioning Sovereignty*, Oxford, Oxford University Press, 2002, pp. 97-122.

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19.4 Court Judgments on the "Common European Tradition" and on National/Constitutional Identity

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

The first shot was fired by 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 a focus on the common and homogenous protection of human rights. As the danger of overwriting the constitutional judicature of the member states was quite clear and present, the response followed with no delay. The German *Bundesverfassungsgericht* reacted in 1974 with *Solange I* based on the Grundgesetz, namely on its eternity clauses. It stated that Community law, consequently the common constitutional traditions protected by the ECJ do not have priority over the protection granted by the Grundgesetz and guaranteed by the German courts. In this way Solange I tried to go against international common traditions by highlighting the role of national constitutions. The quiet battle went 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 provide for a peaceful equilibrium.

On the one hand, Article 2 TEU identifies thecommon values of the Member States, such as the 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(2) TEU states that the Union shall respect the equality of the Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government.

19.5 Constitutional Courts as Guarantors of Balance

What are the consequences of the TEU regulation? On the one hand it means that common traditions as international or supranational values will be protected by the CJEU, upholding the primacy of the EU law against national constitutions. But on the other hand, the TEU itself provides strong case for the argument that the common European constitutional heritage must not be put into contrast with national constitutional identity and vice versa. The two set of values should be brought into an equilibrium.

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This means that the constitutional identity of the different nations cannot be diluted in an artificially constructed common imperial formula. The common values contain what is common, the national values cover what is not common to the Member States. 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 an 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 similar court protection. This protection is vested in the constitutional courts of the signatory and Member States of the CoE and the EU. Thus, while constitutional courts may have different tasks, their primary mission is to protect their own constitutional identity. This is not only a national but – if we are to accept the rules of the TEU – but also a European mission. Yes, even if appears to be strange, the 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 "the independence and sovereignty of Estonia are timeless and inalienable".[14] Another example would be the 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".[15] Or the decision of the Polish Constitutional Court stating 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".[16] 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 shall 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 Czech state sovereignty.

The Hungarian Constitutional Court tread on this path with its decision 22/2016. (XII. 5.) AB. The Court stated 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 – are identical

14 Judgement No. 3-4-1-6-12. (12 July 2012), paragraphs 128 and 223.
15 Decision No. 2006-540 DC of 27 July 2006.
16 K 18/04, 11 May 2005.

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with the constitutional values generally accepted today (…) These are, among others, the achievements of our historical constitution, upon which the Fundamental Law and thus the whole Hungarian legal system are based. (…) The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created, but 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" (Reasoning [64]-[65], [67]).

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 homogenized in a new oppression of supranational nature.