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GENERAL CONSTITUTIONAL PRINCIPLES AND THE PROTECTION OF HUMAN RIGHTS

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No constitution can be exhaustive, whether the issue be a structural or a human rights matter. The unknowables of the future, human fallibility, technical limits, unsolvable controversies — these and more make any document necessarily imperfect and inadequate to deal with the issues that arise and come before a constitutional court.

Accordingly, careful constitutional draftsmen as far back as 1790 in the United States have made sure that the courts and the nation are aware that, as the Ninth Amendment to the American Constitution puts it with respect to human rights,

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The same principle, whether textually provided for or implicit, applies to other matters such as the relations between different branches of government, the powers of the courts and other matters.

Provisions on human rights similar to the American Ninth Amendment are found in Article 39 of the Georgian Constitution and Article 43 of the Armenian Constitution. But even without such provisions, as is the case with the German, Hungarian and former Polish constitutions, constitutional courts have imposed a wide range of constitutional limits on executive and legislative action drawn either from such general expressions as "Legislation is subject to the constitutional order; the executive and the judiciary are bound by law and justice," German Basic Law Art. 20(3); "Georgia is a . . . law-based state," Const. Art. 1.1; "The Republic of Poland is . . .ruled by law," Polish Const. Art. 1(1992), or from no text at all but from notions of an unwritten higher law that supplements the constitutional text. As one distinguished American commentator on the German Constitutional Court put it,

> "many of the central concepts in German constitutional jurisprudence have no visible roots in the text or legislative history of the Basic Law: proportionality, reciprocal effect, the impact of fundamental rights on private conduct, the requirement of fidelity to the federal system."

Perhaps in recognition that the history of liberty and justice is very largely the history of the development of fair procedure, many of these unwritten principles are procedural, though not all. Moreover, many of the constitutions also refer to the State as a "social state," German Basic Law Arts 20(1), 28(1); Ukraine Preamble ("a democratic, social law-based state"), and this brief reference has had significant constitutional implications in many countries.

Perhaps the most explicit, as well as the most extensive development of this unwritten law has been in Germany, where *rechtsstaat* principles go back to the 19th century and have been used to impose an extensive and substantial check on governmental power on behalf of human rights. Many of these principles have also been invoked in Poland, Hungary, the European Court of Human Rights, and even the United States Supreme Court when developing specific rights some of which — like the right to due process of law — are almost entirely empty of any intrinsic meaning and draw their significance and impact on official behavior only from specific judicially imposed limitations. What, after all, is *due* process of law and how can that be turned into protection against unreasonable or arbitrary substantive governmental action or policy, as it is in United States, except by the judiciary's willingness to impose standards of what the courts define as reasonable official behavior?

In an important article in 1995 on the Polish Constitutional Tribunal, Professor Leszek Garlicki defines the basic *rechtsstaat* principle as "maintain[ing] that positive law should be consistent with fundamental rules of justice, fairness, and equity. In its interaction with individuals, the State thus has an overarching obligation to abide by certain unwritten rules of justice." The 1989 constitutional amendment to the Polish Constitution copied the German reference to "ruled by law" and promptly applied such *rechtsstaat* principles as **non-retroactivity and vested rights —** that positive law cannot retroactively diminish vested rights. In an important decision in February 1992, the Tribunal struck down a 1991 law reducing old age pensions and banning from work those pensioners forced to retire because of the liquidation of the enterprises employing them.[1] According to the Tribunal, this infringed upon vested rights, which, though not always inviolate, deserve especially careful protection where pensions and social security rights are involved.

Rechtsstaat principles have also been extensively applied in Hungary where, for example, the Hungarian Constitutional Court struck down many provisions of the 1995 economic austerity proposals because they went into effect too soon, preventing people from planning for such changes and violating the principle of **legal certainty**. Hungarian Constitutional Court President Laszlo Solyom explained the Hungarian development of this principle as follows:

> From the beginning, the Constitutional Court developed the content of the rule of law through legal certainty. The two terms were constantly mentioned together. Later the formula was established in which legal certainty is an essential component of the rule of law. Accordingly, it was interpreted into the content of Article 2(1) of the Constitution. . . . In the ex-nunc decision (#12), legal certainty in the change of regimes were explicitly related to each other: the unlimited susceptibility to challenge of all legal norms of the past -- considering the radical changes to the Constitution -- should in the interest of legal certainty be weighed against the need, as a rule, not to disturb established legal relationships. The result of unconstitutionality of a legal norm must, above all else, be reached under considerations of legal certainty."

Legal certainty appeared again and again in almost all the cases dealing with the political transition:

> "In the compensation-nationalizations cases, in the theory of constitutional criminal law, in the valuation of assets of the old unions. . . . Even. . . throughout the decision on the competence of the President of the Republic. . . . The principle of legal certainly also prevailed in decisions which largely excluded free discretion in connection with the assertion of fundamental rights. Numerous decisions annulled legal norms because their promulgation occurred after their entry into force or because too short a time frame was left between their publication and their entry into source."[2]

The general principles, written or unwritten, go beyond these formal notions, however, and extend to substantive matters such as limitations on freedom of speech, infringements on human dignity, or encroachments on other fundamental rights. In the German Basic Law, **human dignity** stands first and foremost, see Art. 1.1 ("Human dignity is inviolable.") and the

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[1] FBIS-EEU-92-031, 14 Feb. 1992, p. 25; K 14/91.

[2] This was true, above all, for the tax and fees amendments introduced overnight. Id. at A19-20, 20-21, citing cases.

German courts have used this as the foundation of all of their decisions. The post-89 version of the Hungarian Constitution also contains such a provision, Art. 54, and the Court has used it extensively in cases involving capital punishment, abortion, personal data protection, and other matters. President Solyom has characterized human dignity as a "maternal right," which he defined as "the source of still unnamed individual freedoms. . . with which we continuously guard the sphere of self-determination against (state) control." In his eyes, human dignity was intricately and inextricably intertwined with both the right to life, without which human dignity is impossible, and with equality. It is "the minimum condition of human status of which no one may be deprived."

A general concept that is usually unwritten but that has come to be adopted throughout Europe and the United States is **proportionality** — that the evil to be averted by a restriction on speech or some other fundamental right must be greater than the harm to the right, the restriction must be necessary to achieve the purpose for the restriction, and the burden it imposes may not be excessive. For example, in Germany, where "necessary" is narrowly defined, pretrial incarceration is permitted only when necessary to investigate a case or there is a grave risk of recurrence and must be limited in duration to those purposes.

In the American context, the rule is that a restriction on speech or a classification based on race, religion or national origin must be for a very important state purpose and must be, in the case of a restriction on speech, the least drastic alternative and in the case of a racial classification, must be very narrowly "tailored" to achieve the purpose of the legislation. Restrictions on speech are therefore permitted only in cases where it is absolutely necessary for something like the protection of national security or to ensure a fair trial when no other means are possible. A racial preference is permissible only if necessary to achieve a vital goal such as the elimination of the consequences of identifiable discrimination, alternatives are not feasible, the preference is limited in various ways such as time and extent, and the harm to others not so preferred is not too great. A proportionality principle has also been adopted by the European Court of Human Rights, and is used continually by them to evaluate restrictions on rights.

The Hungarian Court has developed a hierarchy of rights to guide its decision-making, which, as President Solyom conceded, "is different from the hierarchy suggested by the Constitution." The Court's hierarchy gives highest priority to the right to human life and dignity, followed by free expression, thought and religion. "As in Germany," he explained, "other fundamental rights [such as property] are to be interpreted restrictively when they conflict with these freedoms."

Unwritten principles have also been used to impose **positive governmental** obligations in Germany, Hungary, Poland and elsewhere. For example, in both Germany and Hungary, the constitutional courts have ruled that the existence of a limitation on infringements of such rights as speech and expression or human dignity imply a corresponding positive obligation to erect statutory or other ways of protecting and promoting these rights. In Germany, the Court ruled that the guarantee of broadcasting freedom required the State to establish a legal framework for broadcasting in which the varying and different interests could be heard.

As noted above, almost all European constitutions declare that the State is not only a state under law but also a "social state." This concept has also been used to develop rights to such matters as subsistence, and in Germany, to shape the interpretation and application of

statutory and regulatory norms.

In Poland, there have been decisions striking down a law limiting unemployment benefits to a specified period for unemployed workers who are their family's sole support, or self-employed, on the ground that they violated principles of "social justice" as well as equality and the right to work.

To sum up, modern constitutional jurisprudence consists of a mix of written and unwritten texts, doctrines and principles. Moreover, the texts themselves can never be so clear that a court has no need for interpretive principles and presumptions, many drawn from fundamental conceptions of human dignity, liberty and justice. Courts do indeed risk criticism from the losers in a dispute, especially if their decisions do not seem absolutely unavoidable and indisputable, and few decisions facing constitutional courts today are like that. But for new courts, there is a rich body of judicial authority from all over the world on which to rest, and there should be no hesitation in doing so. For in the last analysis, a constitutional court can best contribute to making its country a constitutional democracy if it devotes itself to promoting justice and human liberty, and a vital tool in that enterprise are these general principles that courts all over the world have invoked.