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"NEW TRENDS IN THE FUNCTIONING OF CONSTITUTIONAL COURTS IN EUROPE - THE ROLE OF LEGAL TRADITION AND CONTINUITY IN CONSTITUTIONAL INTERPRETATION"

REPORT

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Constitutional courts originally lived their lives by focusing quite exclusively to the national legal order. Later on cooperation started between the courts in order to exchange experiences regarding composition and structure, procedure, competences and jurisprudence. Surprisingly, more and more similarities were found between the respective courts, and the cooperation became institutionalized and formalized. In this respect it was a good initiative the Conference of European Courts, started by the Constitutional Court of the former Yugoslavia in January 1972. The Conference has developed into a vital and important forum for more than 40 European courts. In 1996 under the Hungarian presidency a formalised cooperation started with the Venice Commission that resulted in fruitful logistical and scientific support to the Conference. The thematic Bulletins published on the subject matter of the respective conferences are very important, and the Venice Commission promoted the cooperation of the various regional organizations that concluded in the establishment of the World Conference on Constitutional Justice that held its first congress in 2009, and presently embraces 79 members.

In my view the main point is the international factor in present-day constitutional justice. The following trends have raised recently in the functioning of European constitutional courts:

- globalisation of law and of the challenges, perspectives of legal cooperation
- internationalization of constitutional law
- interaction of international courts (ECtHR, ECJ) and national constitutional courts
- the relation of international standards and national constitutional identity
- in the working-method the growing importance of the use of comparative methods and references to foreign cases.[1] I have to underline in this respect the useful source of information regarding the case-law of constitutional courts, the CODICES database of the Venice Commission.
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Taking note of these important trends, in the present talk I would like to draw attention to an under-valuated aspect of constitutional interpretation, namely the role of legal tradition and continuity.

Societies in search of perspectives, frightened by the uncertain future likely turn to the firmness of past traditions. Even revolutionary law-making is deeply rooted in past experiences.

Interpretation of the law is a procedure in which the relation and attitude to the past is decisive, insofar as historical interpretation is not only an interpretative canon but judicial interpretations in generally are strictly bound by previous interpretations and precedents. Constitutional review embodies judges with great power to decide on the conformity of provisions of statutes and other legal means with those of the basic law of the country, the constitution. Judicial review is, as we know it well, a counter-majoritarian institution. Judicial review and courts should not, and hopefully do not depend on the will of the democratic majority. Having such a great power in their hands, the main factor for the legitimacy of constitutional courts is the coherence and the predictability of the decisions. The challenge of building the decisions on the relatively coherent system of existing jurisprudence thus becomes the legitimising factor of court decisions. But this strong relation to the past (to past decisions) is not equal with legal tradition.

Legal tradition is definitely a broader and more comprehensive concept than that of being bound of former decisions of a court. Legal tradition goes beyond the boundaries of a given (national) legal system, it embraces a legal family or a legal culture. Legal tradition as a

[1] See for a similar approach the welcome letter of President Holzinger on the occasion of the Austrian Presidency of the Conference of European Constitutional Courts.

formative power of legal systems was introduced into the international legal discourse by the work of late Professor Harold J. Berman published in 1983 by the title "Law and revolution: The formation of the Western legal tradition"[2]. This volume of high importance demonstrated how roots of modern Western legal institutions can be traced back to medieval Western church. The follow-up to the book published in 2006 depicted the impact of the Protestant Reformation on the Western legal tradition. Between the publishing dates of the two respective volumes quite a large number of studies were devoted to the problem of legal traditions generally, and to that of the Western legal tradition specifically. Professor Patrick Glenn in 2004 published an entire monograph with the title "Legal traditions of the world. Sustainable diversity in law"[3]. Glenn summed up the most important conclusion of this work in a chapter of the Oxford Handbook of Comparative Law on "Legal families and legal traditions". Both Berman and Glenn underlined the interrelated character of past and future, and the dynamic of them. "Can we find in the group memory of our past experience the resources that may help us to overcome the obstacles that block our way to the future?" – asked Berman in the rather desperate preface of his book (p. vi). "Tradition thus provides justification for change and a means of measuring it, as actual, contemporary conduct can be evaluated against prior teaching." – observes Glenn[4].

An inherent problem of legal tradition is the continuity or discontinuity of a legal system. Let us take an example: If we point to post-revolutionary American law, we have to acknowledge how firmly it was rooted in English law and practice. In Europe, most continental legal systems had to face the problem of continuity – discontinuity due to authoritarian periods in their recent history, and this is true of all those Western countries where the most influential and significant constitutional courts function, like Austria, Germany, Italy, Spain or Portugal. In the case of the constitutional courts of the so-called new democracies this observation is similarly evident. Courts had to elaborate their approach to the question of continuity: how do they face the legislation of the period before the adoption of the new constitution?

For example, in Italy, the Corte Costituzionale made clear in its very first judgment the relation to the laws that were adopted before the Constitution (sentenza 5 giugno 1956).

In Hungary, the Constitutional Court in its often-quoted decision on retroactive criminal legislation[5] made the following statements:

The enactment of the constitutional amendment 1989, in effect, gave rise to a new Constitution which, with its declaration that "the Hungarian Republic is an independent and democratic state under the rule of law," conferred on the State, its law and the political system a new quality, fundamentally different from that of the previous regime. In the context of constitutional law, this is the substance of the political category of the change of system.

The politically revolutionary changes adopted by the Constitution and the fundamental laws were all enacted in a procedurally impeccable manner, in full compliance with the old legal system's regulations of the power to legislate, thereby gaining their binding force. The old law retained its validity. With respect to its validity, there is no distinction between "pre-Constitution" and "post-Constitution" law. The legitimacy of the different (political) systems during the past half century is irrelevant from this perspective; that is, from the viewpoint of the constitutionality of laws, it does not comprise a meaningful category. Irrespective of its date of enactment, each and every valid law must conform with the new Constitution – underlined the Constitutional Court.

[2] Harvard University Press, 1983.
[3] Oxford University Press, 2010 (4th edition)
[4] M. Reimann – R. Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford University Press, 2006. p. 428.
[5] Decision 11/1992 (March 5) AB

The Constitutional Court emphasized that it cannot ignore history since the Court itself has a historical mandate. The Constitutional Court is the repository of the paradox of the "revolution of the rule of law": in the process of achieving the rule of law, beginning with the Constitution and manifesting itself in the peaceful change of system, the Constitutional Court, within its powers, must unconditionally guarantee the conformity of the legislative power with the Constitution.

As regards the new constitution of Hungary called Basic Law adopted in 2011 and entered into force in January 2012 envisages a rather complex view of continuity with the achievements of the historical constitution of the country (Hungary until 1949 did not have a written constitution), and on discontinuity with the totalitarian regimes of the 20th century.

The concept of historical constitution is mentioned in the Preamble and in the paragraph on the interpretative tools of the constitution. According to the opinion of the Venice Commission on the new Hungarian constitution "the reference to the 'historical constitution' is quite unclear, since there have been different stages in the development of different historical situations in Hungary and therefore there is no clear and no consensual understanding of the term 'historical constitution'"[6]. The reference to the historical constitution is unusual but understandable. It is unusual because in the last two centuries nearly all European states adopted written constitutions. Besides England only Hungary had an unwritten constitution until 1949. When interpreting judicial independence the Hungarian Court could recall milestones in the Hungarian legal history like the Act on the judiciary of 1869 that defined the guarantees of judicial independence with great clarity. The contested provision of the new constitution (Article R) underlines the importance of the achievements and not of the historical constitution as such. In its decision the Constitutional Court underlined: the Fundamental Law "opens a window" on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our legal culture today would be rootless.[7]

The question of continuity and discontinuity has been raised recently in another aspect. When the new constitution was adopted, the question was debated whether the jurisprudence of the Constitutional Court developed under the old constitution would remain in force or would become obsolete. It was proposed that the constitution should declare that all former decisions of the Constitutional Court lost their force. The idea was rightly and fortunately rejected, and the Constitutional Court declared that when the text and the interpretational context of the former and the new constitution are identical, the former decisions (precedents) of the Court remain valid, and any overruling of them should be thoroughly justified. Then, the Fourth Amendment to the Fundamental Law repealed the earlier case-law of the Constitutional Court, although without prejudice to their legal effect. This is even more strange with regard to the numerous references to the historical constitution. As the Venice Commission opinion rightly underlined: it can hardly be denied that the previous democratic constitution of 1989 and its interpretation by the Constitutional Court are part of the concept of historical constitution.[8]

To sum up:
Legal tradition is not a balance or a shadow cast by the past. On the contrary, tradition might serve as source of self-confidence, self-consciousness, self-understanding and inspiration. We should explore this tradition, these common roots both on the European and the national level in order to face the present challenges, and build up our perspectives for the future.

[6] Opinion on the New Constitution of Hungary – 621/2011, para 34
[7] Decision 33/2012.(July 17.)AB para 74.
[8] Opinion ont he Fourth Amendment to the Fundamental Law of Hungary - 720/2013, para 99.