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Post-Revolutionary Europe?

I. Introduction

In February 2018, I was glad to be in Osnabrück and I had listened with great interest to the words of all renowned colleagues. I must draw attention to the fact that my position on the theme of the conference – that is, on the idea of a crisis in the rule of law – has been manifold. The rule of law has many facets, and I was able to witness it under many guises.

I could see the rule of law through the eyes of a dissident, who fought against the Czechoslovak communist regime, which claimed to uphold the rule of law but could never truly do so. To us, the rule of law was a utopic idea, which we looked up to from behind the Iron Curtain.

After 1989, in the stellar moment of my nation, I had the honor and responsibility of taking part in the transformation of the authoritarian regime of a single political party into a democracy employing the rule of law. For a short time, I served as a Prosecutor General, then as a Minister of Justice and a Deputy Prime Minister.

For the last fourteen years, I have reflected on the idea of the rule of law as the President of the Czech Constitutional Court. I admit that my reflections are not exclusively optimistic but, while I still have more questions than answers, I am sure of the fact that our chosen path, though it may not be the shortest or the easiest, leads us in the right direction.

I first hoped for the rule of law, and then helped establish it, and now it is my job to protect it. The structure of the text reflects this life trajectory.

II. The Rule of Law – Different Notions

Every country, whether democratic or totalitarian,[1] declares in its constitutional documents that it is governed by law and thus implies that it seeks to rule according to the rules of law. This adherence to one's own rules, however, differs significantly from *Hart's* understanding of the rule of law from the point of view of an individual[2] be-

1 This was also the case of the socialist Czechoslovakia. Although its Constitution emphasized mainly economic relations, it also included a reference to adherence to law: "All citizens and all the state and societal organizations are governed by the legal order of the socialist state in all their actions while observing the full application of socialist law in the life of society. (Article 17 (1) of the Constitutional Act No. 100/1960 Coll., July 11, 1960, Constitution of the Czechoslovak Socialist Republic).

2 „Rules are conceived and spoken of as imposing obligations when the general demand for conformity is instituted and the social pressure brought to bear upon those who deviate or threaten to deviate is great". See *H. L.A. Hart*, The Concept of Law, London, 1961, p. 84.

OER 4/2018, DOI: 10.5771/0030-6444-2018-4-561

cause – unlike a community of human individuals – the state plays a game for which it writes its own rules, marks out the playing field, and serves as a referee all at once. Despite this, or perhaps because of this, there are certain minimal requirements for a state's rules to be seen as rules of law. These requirements doubtlessly include their clear definition and ability to access them, their universality, and the forbidding of retroactive application, but these requirements represent the mere conditions under which rule of law can exist, not the rule of law itself. *Hana Arendt* associates totalitarian regimes with terror, but totalitarianism can justify terror with arguments and act as if the repressive measures it takes were necessary in order to preserve the rule of law.

What these totalitarian regimes of the 20th century had in common, however, is the pushing aside of the individual, out of the defined framework of the political system, and replacing him or her with the group. The group blends with society and society blends with the state. Subjective public rights – as *Berndt Rüthers*[3] rightly points out – were limited by the condition that they do not conflict with the public interest. I therefore see the line between totalitarian regimes and the rule of law in whether the individual must defend his or her right ahead of time or whether it's the state that is held accountable for each encroachment on the rights of the individual.

Twenty-nine years ago, my country chose a path towards the creation of a substantive rule of law. Within it, the state is not only subject to the law but the law itself is subject to preconditions regarding its content. These preconditions are determined by our ideas about justice, democracy, and human dignity. Since the end of the 18th century, when human rights demanded mere respect from the state, we have matured to modern times, in which we expect the state to act preventatively, to benefit and defend rights which could be merely threatened by the actions of the state or some other third party.

These ideas are reflected in the systemic changes which Czechoslovak society underwent as it transformed into a democracy. The Czech Republic, too, infused the idea of the rule of law into its constitution, the first article of which reads:

> The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.

A mere declaration is not enough, however. Under the rule of law, the law is not simply an internal memo for the government, as the Constitutional Court itself remarked,[4] but a publicly accessible resource, which is chiefly supposed to inform the citizens themselves of the boundaries of the individual's freedom and thus defend that freedom against the encroachment by a public authority. The principle of the rule of law is to prioritize the citizen over the state and thus to prioritize basic human rights and liberties of the citizen.

For this reason, among others, the rule of law requires a constitutional court. Such an institution oversees that the principles of the rule of law outlined in the constitution are upheld. A number of institutions which apply the law have a tendency to dismiss

3 *B. Rüthers*, Rechtstheorie, Munich, 1999, p. 45.

4 The Constitutional Court award ref. no. Pl. ÚS 43/93 of 12 April 1994 (on the proposal of the President of the Republic to abolish a part of the Criminal Code).

the constitution as a historical ornament on the mechanism of the state's power – traditional rather than functional. We have to constantly remind them – which is to say, remind ourselves, the constitutional courts – that the constitution has its normative value and, as long as it is valid, takes precedence[5] over all forms of state power. All actions taken by state powers must therefore stay within the boundaries of the law but – most importantly – within the boundaries of the power given to that particular state body by the Constitution.

III. Rehabilitation, the EU Accession Process, and the Re-Definition of the Role of the Constitutional Court

In Czechoslovakia, and later in the Czech Republic, it was very difficult to erase, or at least reduce, the wrongs committed by the state. The greatest wrong of the previous regime was the repression of human dignity and the loss of freedom resulting from participation in rituals of compliance, which is to say mandatory displays of support for an illegitimate, criminal regime. The difficult task of amending this was put on my shoulders. First, within five months, we drafted and passed laws concerning legal rehabilitation, which *ex lege*, on the day they took effect, annulled all criminal sentences imposed for the so-called crimes against socialism. In cases where individuals were sentenced for political reasons under the guise of fabricated crimes, we opened the possibility for the re-evaluation of the sentences. The legislative work underlying this effort was vast, as it financially compensated each wrongly-accused individual, according to the length of the time served, and even granted the victims a retirement supplement.

Reparation for property losses through restitution laws was a much more complicated task. During the legislative process, which culminated with the passage of a number of laws at the beginning of 1991, it became clear that the breadth of the property harm committed during the forty years of the communist regime is so vast that it would not be possible to fully compensate all of the property losses, nor would it be possible to make an exhaustive summation of all the legal titles on the basis of which the previous regime confiscated the private property of small business owners, private farmers etc. along with the property of the so-called enemies of the people. The

5 It is not without interest that the normative value of a constitution is not subject to legal considerations only in the recent decades when associated with the European constitutional judiciary. In 1787, a lawsuit was filed in North Carolina, whereby the heiress to an English landlord, *Elizabeth Cornell Bayard*, claimed inheritance from her father of property which was confiscated during the American Revolution. The property was bought by a certain *Spyers Singleton*. The Constitution of North Carolina, however, had prescribed that it is always a jury which must rule on any forfeiture of immovable property. The Supreme Court of North Carolina first waited for the Parliament to revoke its Confiscation Act, and when it did not, it declared that legislators could not enact laws that violated the Constitution. If I am not mistaken, the Supreme Court of North Carolina was ahead of the US Supreme Court (*Marbury vs. Madison*) by a whole sixteen years with its requirement for compliance with the Constitution. However, the case did not end well for *Elizabeth Cornell Bayard*. Due to defects in the legal submission, she did not win the confiscated property back. The case *Bayard vs. Singleton*, however, made legal history.

preambles to all of the restitution laws therefore came to contain a phrase that indicated that their goal was to simply mitigate the property wrongs committed by the communist regime and that the list of legal titles used to apply for the restitutions of the property was only demonstrative, whilst anyone whose property was taken without legal reasons or by breaking generally accepted human rights and freedoms has the right to property restitution, or at least to financial compensation, should the physical returning of the property not be possible. Here, I may point out that Czechoslovakia was the first post-communist country that attempted to legally resolve the financial wrongs and harms caused by the previous regime, and that it thus became a certain inspiration for the countries with a similar past.

From coming to terms with the past we – to put it bluntly – moved on, in the second decade of the activities of the Constitutional Court, to coming to terms with the European Union. At the very beginning, before we joined the European Union, one could call our approach idealistic. It was necessary to amend an enormous number of laws to comply with the European *acquis*. In this phase, the Constitutional Court placed emphasis on the important role of the Court of Justice of the European Union and the contribution of the European *acquis* to the cultivation of the Czech national system. In addition, in its case law,[6] the Constitutional Court emphasized the added values of EU law, which was not to be seen as the law of a foreign country but, rather, as a system that should influence the interpretation of the laws of our own country, which at the time was only a candidate for membership in the EU.

Soon, however, the Czech Constitutional Court had to face a dilemma, which must have been faced by the constitutional courts of every newly-accepted country of the European Union. What will be the court's function in this new, EU-based, environment? The first option seemed to be the adoption of the role of a passive constitutional court, the purpose of which would be to oversee whether the decisions of general courts complied with EU laws and whether the domestic courts' interpretation of EU laws is in compliance with that of the Luxemburg's interpretation.[7]

The second possible position was the redefinition of the role of the constitutional court itself, to a role that would not limit the court to being a national "loudspeaker" of the European Court of Justice of the European Union, but which would emphasize its role as the "judicial body of constitutional protection." In such a case, the goal of the court would be to protect human rights, guided by either the constitution or the international human rights agreements, which are a part of it. Such a constitutional court would respect the ultimate interpretive powers of the Court of Justice of the European Union and could interfere only when the application or the interpretation of the EU law by general courts would mean breaking the national constitutional order, particularly the constant elements of its substantive focus.

6 See, Constitutional Court award ref. no. Pl. ÚS 5/01 dated October 16, "the Milk Quotas".

7 That is in line with the consistently expressed opinion of the Court of Justice of the European Union that is based on the principle of the absolute primacy of EU law with respect to all components of the national legal system, since the judgments of 1964 – 6-64 *Flaminio Costa vs. Enel* – or of 1978 – 108/77 *Amministrazione delle Finanze dello Stato v. Simmenthal*.

The Czech constitutional court chose the latter option, just as the German constitutional court did.[8]

IV. The Constitutional Court in the Light of the Aftermath of the Transitional Period, Populism and Demagoguery, and a Civilization Crisis

The events we have been witnessing in Europe during the last couple of years open a number of questions. It seemed that at one point, seventy years after the Second World War, we have shunned all crises; that the revolutions that had divided Europe have been replaced by a unified European evolution. It seemed at one point that our growing richer together, our collaboration, our safety, and prosperity would lead to the broadly accepted idea of the continued European integration.

Not even ten years ago, the European Union was afflicted by a wave of debt and financial crisis that uncovered hidden, and until then untreated, pains within the entire system. Soon after, the EU Member States became divided over the sudden onslaught of refugees from the war-torn countries. Gone was the optimism of yesteryear, along with the consensus on further integration. The last blow, perhaps, came on 23 June 2016, when 51.9 percent of the British citizens voted to leave the European Union.

I am not afraid to say that the European Union has never experienced such divisive tendencies as it does today. It would be simplistic, however, to say "I knew it!" or "It could not have ended otherwise!" The European Union is the strongest force of collaboration on our continent and times of crisis provide moments that can fortify us.

If we went solely by newspaper headlines, we might think that the EU balances on the edge of a precipice, slowly tilting forwards. I think, however, that the situation is not so grave. The EU Member States are tightly bound by their comprehensive legal systems. Anyone can cast doubts on our common political, economic, or social interests, but no one can doubt that EU law has slowly but surely "grown into" national legal systems and is thus an intrinsic component of our common European future.

8 The Constitutional Court award ref. no. Pl. ÚS. 50/04 of 8 March 2006, in the so-called Sugar Quotas III. The Constitutional Court stated that "[...] it is not competent to assess the validity of Community law. Such issues fall under the exclusive jurisdiction of the European Court of Justice. From the point of view of the European acquis, as interpreted in the past by the European Court of Justice (ECJ), Community law prevails in application over the legal systems of the EC Member States. According to the case law of the ECJ, where there is an exclusive regulation by Community law, the Community law prevails and cannot be overruled by any reference criteria laid down in national laws, including the criteria applied at the constitutional level."; but it also added that "[...] a delegation of some of the competences by the national authorities can last so long as these competences are exercised by the EC bodies in a manner compatible with the foundations of the state sovereignty of the Czech Republic and in a way that does not encroach upon the very essence of the material rule-of-law. The Constitutional Court is charged with the protection of constitutionality [...] The essential elements of a democratic state governed by the rule of law, according to Article 9 (2) of the Constitution of the Czech Republic, lie outside the disposal of the lawmaker.".

Such moments precisely require the existence of strong and independent constitutional courts. The centrifugal tendencies in European integration that we are now witnessing have a negative effect on the constitutional judiciary and its tasks, however. Why? Because constitutional courts must now navigate between Scylla and Charybdis, between domestic and international pressures.

I deem our entire Euro-Atlantic civilization to be afflicted by a specific crisis characterized by a growing distrust in the foundations of the liberal democracy and the current establishment. This trend is particularly potent in the post-communist countries of Central Europe. Over 28 years ago my old, and now unfortunately deceased, friend and Polish dissident *Jacek Kuroń* uttered a prophetic sentence: "The last phase of communism will be nationalism." The leaning towards nationalism is apparent in our region, apparent in the rejection of all "foreign influences and elements" and in a heightened perception of our sovereign nationality. We are experiencing strengthening of the ideas of national exclusiveness and national uniqueness and an idealization of our own history – all of which accelerate the gears of nationalism. And it is very difficult for nationalism to coexist with the rule of law. Populist political parties that are increasingly reaching for power, have no problem taking control over executive and legislative branches, because the results of elections give them the right to do so. Constitutional courts are often the hardest nuts for them to crack, because they are not dependent on elections and are professionally deaf to populist proclamations. I therefore watch with apprehension as the new political representation of our region systematically turns against constitutional judiciary in which it – rightfully – sees an obstacle to the completion of its political reforms. Five years ago, Hungary limited the power of its constitutional court[9] while, two years ago, Poland's constitutional court found itself utterly paralyzed. For several years, the Slovak constitutional court had to make decisions lacking a fourth of its members, whom the president refused to appoint.[10] Five years ago, Romania underwent a constitutional crisis involving strong pressures against the constitutional court in connection with the impeachment of president *Traian Basescu*. And the Polish Constitutional Tribunal is a sad testament to the situation where the executive branch was able not only to break its constitutional judiciary but also "castrate" it. I do not want to speak, however, about the situation in Poland which so pains me, because almost everything has already been written about it.[11] Until recently, I thought my country would avoid a similar trajectory. I am not worried, however, about the status of our constitutional court, which is stabilized for years to come and is not afraid to face the threat of populism and demagoguery, which have taken

9 For details see: *L. Sólyom*, The Rise and Decline of Constitutional Culture in Hungary, in: A. Von Bogdandy, Pál Sonnevend (eds.), Constitutional Crisis in the European Constitutional Area, Bloomsbury Publishing, 2015.

10 *Andrej Kiska*, the President of the Slovak Republic, appointed the three judges only after a very unambiguous decision of the Constitutional Court in December 2017. The dispute over the appointment (or no appointment) of the judges, the court was short of, started back in 2014.

11 Recent and excellent blog by Professor Sadurski, see *W. Sadurski*, Judicial "Reform" in Poland: The President's Bills are as Unconstitutional as the Ones he Vetoed, VerfBlog, 2017/11/28, http://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/, DOI: https://dx.doi.org/10.17176/20171128-122808.

hold of our political sector and are gradually taking control of the media, which are now almost pathologically influenced by social media. Of course, even traditionally democratic countries which lie west of our borders face similar threats. For now, their undeniable advantage rests in their greater immunity and resistance to various forms of nationalism and xenophobia, populism and demagoguery. We should reflect on the causes of our civilizational crisis, however. I see them chiefly in the dehumanizing effects of globalization which, besides its positive effects, brings with it a growing sense of loneliness and hopelessness within significant portions of the population, who feel they are not represented by traditional politicians and, in their hopelessness, look for change – ideally in the form of a Messiah of some sort. In the post-communist countries this trend is amplified by a significant change in circumstances – a society that was almost absurdly egalitarian gave birth to a group of billionaires, thousands of former state-run companies went bankrupt and their employees quite suddenly found themselves on the cutting-room floor, which brought about a phenomenon which was, at least in my country, utterly unknown until then – homelessness. Most importantly, the collective dream of Edenic prosperity, which we thought we were entering, utterly evaporated for most citizens of the post-communist countries. The individual who was left behind in this new circumstance feels he has lost his identity and thus succumbs to the civilizational anxiety and apprehension. This fear provides fertile ground for all populist trends, which offer an image of the enemy – whether that enemy is a richer neighbor, a migrant, an unwanted immigrant, a person of a different race or religion. In my country, part of the political sphere and the media even label the European Union itself as the cause of the personal failures.

Setting aside – often very complicated – national situations, constitutional law does stand before a difficult task within the international context as well. The Member States of the European Union have, in their constitutional systems, first created constitutional courts, gave them significant powers, and only subsequently became members of the European collective, i.e. the European Union. If any of the national institutions were significantly weakened by integration with the EU, then it were not so much the parliaments[12] but rather the constitutional courts. Constitutional courts were established, after all, as sovereign institutions meant to defend the constitution and now, as a consequence of the presence of the „European law" and the „European constitutionality," their position within the national system has weakened. Their mother states have given up their monopoly on the execution of the public power on their turf, but it was not made clear how the constitutional courts should deal with the transition from the constitutional monism to the constitutional pluralism.

Three basic questions therefore come to mind; questions which constitutional courts must ask of themselves:

1) What is and what is not European law, anyway?

   When the Czech Republic prepared for its accession to the European Union, it had to transpose an enormous number of directives. At the time, I was responsi-

12 I'm leaving aside the ongoing discussions about the lack of democratic legitimacy of the EU institutions, for details see for instance, *M. de Jongh/T. Theuns*, Democratic Legitimacy, Desirability, and Deficit in EU Governance, Journal of Contemporary European Research 13(3)/2017 pp. 1283-1300, https://www.jcer.net/index.php/jcer/article/download/795/664/.

ble for this process and as we went through thousands of pages of European legal texts, we were able to check many laws as "done" right away, simply because these laws had already been encompassed in our own national legal system for a number of years. However, if anyone should challenge these laws' constitutionality, can we say with certainty whether it is a national law or the transposed European law?

2) Is the protection of basic values and rights hierarchical or heterarchical?

As the catalog of human rights on the national, European and international levels expands, their hierarchy becomes less clear. When it comes to competition between non-hierarchical laws, which do not have a human-rights element, the situation is even more complicated. Constitutional courts thus must create complex legal constructs simply to justify their own interpretation of the application of this or that law within the national context. What is more, the constitutional courts are often harshly criticized by legal academicians, politicians, political scientists, and judges of lower courts for their opinions because, within a heterarchical system, anyone can find their own truth. A judge within the constitutional court is neither – and I want to emphasize this – a legal theoretician nor a dialectical philosopher. It is not a constitutional judge's task to conduct a dialogue between various legal systems. A judge must, first and foremost, make legal decisions, fairly, quickly, and predictably.

3) In case of doubt, who will have the last word?

The world of law needs a system and systems need structure. Unlike certain academics,[13] I do not think that an integrated Europe is a post-sovereign entity. The need for the last word, which is to say the "definitive arbitrator" remains a question that has not been reliably answered. Of course, I am aware of and welcome the initiative of the Court of Justice of the European Union, which calls for a dialogue with national courts. I cannot, however, shake off certain doubts as to whether this dialogue consisting of preliminary questions is truly a dialogue. Judges of national courts may ask a question, but they are not granted the status of a party to the proceedings,[14] cannot make motions, explain, or comment on anything further. The only thing they have a right to is a binding legal opinion at the end of the proceedings. Even in the context of pooled sovereignty and constitutional pluralism we are dealing once again with a hierarchy: someone asks something, someone else argues, and someone else still makes a binding decision as to how things should be.

13 For instance *Neil MacCormick*, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth, Oxford, 1999 or *N. Walker* (ed.), Sovereignty in Transition, Oxford – Portland, Oregon, 2003.

14 This status is reserved for the government. That very government which is often led by interests completely contrary to the interests of the court asking the preliminary question.

V. Conclusion and Outlook

This conference spoke of a crisis in the rule of law. I have witnessed many international crises and many revolutions in my long life, and perhaps because of this, I do not think the rule of law is in crisis just yet. Or better yet – the idea of the rule of law, and the desire to adhere to it, is not in crisis. The rule of law is woven into the roots of our statehood and is capable of weathering strong winds.

We can, however, speak of a crisis of the present-day constitutional judiciary. It is a crisis of the very institutions that are to guarantee the rule of law, and which are now fragile vessels. Often, their rulings are not welcome by political institutions of their own countries, because they are too restrictive. They are restrictive, however, because they are called to monitor and control the use of the executive power, not to make the wielding of power easier. A hundred years ago, the first president of Czechoslovakia, *Tomáš Garrigue Masaryk*, poignantly said:

> "If our democracy is flawed, we must overcome its flaws, not democracy itself."

Some of the Central-European countries now seem to be leaning towards the latter…

The fact that – at the national level – constitutional courts are confronted with a monistic understanding of the European constitutionality cannot lead to their silencing. Constitutional courts exist to protect national constitutions, and they cannot give up this task simply because of the emergence of the phenomenon of the European law. If the European Union asks constitutional courts of the Member States for openness, it must itself be open in its interpretation of its autonomous legal order. In this postmodern European reality, states are no longer the sole actors but neither, by far, is the EU. I therefore suggest that we pay more attention to the constitutional traditions of the Member States, but also to the case law of the European Court for Human Rights. I suggest that no one claims the dogma of the last word.

In conclusion, I would like to emphasize that the Constitutional Court of the Czech Republic feels itself to be part of a broader mechanism of human rights protection in the European area. We consider the European Union to be the greatest success of the post-war Europe, and we believe the concept of the rule of law has and continues to overcome differences between the European citizens, courts, and nations. And that is one of the greatest accomplishments we have achieved on this continent.

My friend, *Václav Havel*, said 28 years ago:

> "Everything implies that we must not be afraid to dream of the seemingly impossible, if we wish for the seemingly impossible to become a reality. Without dreaming of a better Europe, we will never build a better Europe" [15]

I think that is a sentiment we should all follow!

15 Quoted from *Václav Havel's* speech before the Parliamentary Assembly of the Council of Europe, May 10, 1990.