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Constitutional identity and universal values:

The art of balance

National approval as a key to constitutional identity

INTRODUCTION

The contemporary theory of constitutionality lies between two opposing premises: on the one hand there is constitutionalism as a basis for an upgrade of the accomplished standards of constitutionality², which are implied in European political systems, while, on the other hand, there is a collision between the *national context*³, which pursues its form of national identity, and the so-called universal values, which *universality*, as a rule, constitutes an assertion or dictation of a political science theory or a constitutional law theory. One of the initial problems in mutual understanding is the **meaning of constitutional language**, which *Frederick Schauer*⁴ spoke about very clearly, whose admittedly simplified picture of the constitution and the interpretation thereof nonetheless points to the necessity to *standardise the terms we use!* For, the language and terms used by constitutionalists of Anglo-Saxon, particularly so of American legal areas, and the language and terms used by constitutionalists of European legal area, which are based on Kelsen's⁵ legal philosophy, may be confusing as their meanings do not match at times.

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² Constitutionality in the narrow sense of the word: brought down to a democratic system, fundamental human rights and freedoms, regular election cycles, rule of law, market economy.

³ For the purpose of this paper, it is defined as a form of application and interpretation of the established standards of constitutionality within and for the benefit of a given state or a suprastate entity.

⁴ Frederick Schauer "An Essay on Constitutional Language" UCLA Law Review 29 (1982).

⁵ Hans Kelsen, founder of contemporary, not merely of European, theory of constitutional justice.

SUBJECT-MATTER OF THE PAPER

1.1 *Theoretical overview*

It is up to us to use the terms with caution, and to underline the following: the author belongs to the Kelsen's school of constitutional law; the basis of legal philosophy is European continental, and all other interpretations, agreements or disagreements are within the mentioned framework.

Prof. R. Arnold, when talking about his lifetime project – European constitutional law⁶, invites us to consider the common basis including common interests, as the necessary elements of the future *common constitutional area* (European), which is acceptable for everyone in contemporary Europe. However, one cannot find the answer here to the question on how to avoid the conflict between the national constitutional identity and the *European*, for the *common framework* is increasingly understood to be the framework, which one may not enter unless all – and not only universal – values are accepted in entirety, which the keepers of the gate impose as an entrance *ticket*.

On the other hand, prof. Valeriy Zorkin points to asynchronous nature of the global historical evolution and further develops the hypothesis on sociocultural peculiarities of national law (of the legal and constitutional system and order alike).⁷ In doing so he points simultaneously to the **common context** as the basic one, with indisputable *universal values*, while considerate of the **national context**. Perhaps as a paraphrase of the already referenced paper of Frederick Schauer, if the text of the constitution is the frame of a painting of *constitutionality* then the colours on that painting are picked according to the nature of the state, however a painter's brushstrokes come from the same ***universal school of values***.

This brief overview tells us how difficult it is to give a true recipe for a balance between these two great and valuable theories, hence the headline on the art of balance.

In this paper we will deal only with the minor portion that carries importance, particularly in divided states – divided politically, ideologically, nationally, these

⁶ R. Arnold. *Constitutional identity in European Constitutionalism*, www.constcourt.md/public/files/file/conferinta_20ani/programul

⁷ Valeriy Zorkin. *Civilisation of Law and Development of Russia*, CC St. Petersburg International Legal Forum, 2015.

divisions, however, are embedded within the already mentioned framework of constitutional order.

1.2 *Definition of terms*

For the purpose of this paper, we shall define the key mechanisms of constitutionality as accepted by the author.

National approval is certainly a key to constitutional identity, but it certainly depends on the social consensus reached beforehand concerning key social values that a constitutional order accomplishes and protects. **Identity** implies the existence of equal values, acceptable for the majority of the national area. **Constitutional identity** implies **national and universal values** codified in the constitution, which acceptance is not brought up as a question during discussions, rather those same values are used as a key to interpretation during discussions concerning the application of the constitution. Therefore, **national approval** is a presumption of a functional constitutional system.

2. EXAMPLE OF BOSNIA AND HERZEGOVINA

2.1 *Constitutional system*

Bosnia and Herzegovina, by its constitutional and social organisation, certainly is an example of a system within which we may find all elements, which we have referred to above. The Constitution of Bosnia and Herzegovina⁸, by its genesis and origin⁹, is a classical result of a legal technique and vocabulary of Anglo-Saxon law school. However, the internal structure of the Constitution, as well as the structure *of the dictate*¹⁰, is a form of a classical European constitutional school. One may even be able to draw a parallel with para-constitutional system of the state that no longer exists¹¹ and thus point to

⁸ Constitution of Bosnia and Herzegovina.

⁹ General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton USA/Paris France, 1995, which established the text of the Constitution as its Annex No. 4.

¹⁰ In terms of the constitutional distribution of responsibilities among the State, Entities and Cantons.

¹¹ Constitutional system of the former Austro-Hungarian Monarchy also had the division of responsibilities between two units, had a narrowly limited responsibility of the common state. However, due to monarchist organisation of personal character, similarities cease here.

historical roots of the more recent European law school, which was applied during the conception of the Constitution.

In brief, Bosnia and Herzegovina has the following: state organisation (constitutional term of *Bosnia and Herzegovina as a State*); organisation of Entities (the Republika Srpska and the Federation of Bosnia and Herzegovina); organisation of Cantons (administrative units within the Federation of Bosnia and Herzegovina, which have, under the Constitution of the Federation of Bosnia and Herzegovina, exclusive responsibilities in their respective areas). Also, as relevant for this paper, it has three peoples (Serbs, Croats, Bosniacs) who are treated in the constitutional system as *constituent peoples* (i.e. members of the mentioned three peoples enjoy equal rights throughout the territory), while, at the same time, the Constitution uses the term *citizens* and *citizens from among Others* (who again enjoy the guaranteed rights to a lower degree, though, than the constituent peoples). Certainly, it should be pointed out that three historical religious communities (Christians – Catholics and Orthodox, and Muslims - Sunnis) correspond with ethnic affiliation, while all along being burdened with hard, tragic and mostly repeated historical conflicts, with the media engaging in constant recollections of the past. Even advocating positions on state organisation (autonomy, independence, centralism or unitarism) corresponds with or is attributed to ethnic affiliation.

2.2 National approval

If we go back a little, to point 1.2, we may try to find and include in the established definitions that which makes up a binding fibre in Bosnia and Herzegovina. The reached social consensus is, as a matter of fact, a product of a peace agreement, the identity is torn into three ethnic communities, and irrespective of the fact that the Constitution carries codified universal values¹², which everyone in the country invokes in every discussion (admittedly while making conflicting claims), the question of constitutional identity remains open. This leads us to a conclusion that there is no national approval¹³, so we go back to the question of the art of balance.

¹² E.g. the Constitution of BiH prescribes that the European Convention on Fundamental Rights and Freedoms shall make up an integral part of the Constitution.

¹³ The sole thing undisputed among everyone in BiH, as a form of “national approval”, is the aspiration for BiH to become a member of the European Union.

2.3 *The art of balance*

The constitutional norm foresees the Constitutional Court of BiH as the sole body not composed under the ethnic or Entity parity or proportion. Its responsibility, in the area of abstract control of constitutionality, lies in the control of constitutionality of not only laws at the state level, but also of constitutions and laws of entities, as well as in relation to individual and collective rights¹⁴ that exist or have been omitted in the constitutions of cantons. At the same time, it has the responsibility to assess whether a violation of constitutionality has occurred in the process of adoption of laws¹⁵. If we go back to the explanation of a complicated constitutional, national and political situation classified into political and ethnic blocks, we see a huge problem before this court when it comes to decisions relating to the review of constitutionality following requests, which are, as a rule, welcome or challenged by one or another ethnic group.

That is when the *art of balance* is taken rather differently. Any decision where the Constitutional Court relied on a diplomatic maxim *loss-loss* would undoubtedly lead to the loss of authority – without thereby mentioning how unprofessional that is and essentially beyond a key obligation of every constitutional court – to be the guardian of the constitutional norm!

We go back to the beginning, constitutional identity may be defended (in examples we give) in one way only: by way of complete professional interpretation of constitutional norms, irrespective of all conflicting positions we have talked about and the origins of requests and *supporters pro et contra*. That is when the art of balance is taken differently, as the art of interpretation of constitutional norms in *national context*, which, by all means, relies on universal values or standards when it comes to fundamental rights and freedoms, as well as on the most important international documents when it comes to collective or political rights.

3. CLOSING REMARKS

Without the intention to impose our positions, in this paper we point to different forms of meanings of universally accepted terms and how their

¹⁴ If a violation occurred in a cantonal constitution of the rights guaranteed under the Constitution of BiH or the European Convention, such as e.g. the right to language and alphabet.

¹⁵ The so-called protection of the vital national interest.

mechanical transposition from one state organisation into another may, which oftentimes does, create an effect contrary to the desired one.

Perhaps for our topic, it is more important if in every state system we deal with the constitutional system within the ***national context, relying on universal values and applying universally accepted standards, thus, each for themselves, creating constitutional identity while showing the art of balance in their work.***

The old saying *mane, tekel, fares* in our case means that the art of measuring, weighing and dividing depends on our ability to find balance!

Thank you for your attention.

Saint Petersburg, May 2019