Strasbourg, 15 December 2016

CDL-PI(2016)017
Engl. only

THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE – IDEA

and

THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAWYERS – IACL-AIDC

under the auspices of

THE MINISTRY OF FOREIGN AFFAIRS OF ITALY

CONFERENCE ON

"GLOBAL CONSTITUTIONAL DISCOURSE AND TRANSNATIONAL CONSTITUTIONAL ACTIVITY"

PALAZZO DUCALE, VENICE, ITALY

7 December 2016

"CONSTITUTIONAL HERITAGE AND THE FORM OF GOVERNMENT"

By Ms Hanna SUCHOCKA

(Chair of Constitutional Law, Adam Mickiewicz University, Poznan
Honorary President of the Venice Commission)

In my presentation today I would like to analyse the problem, which could be called the importance, or even better the "implementation" of constitutional heritage in the constitution making process in various countries. As a person who is coming from the post-soviet part of Europe and as a person who was actively, as a MP, involved in the constitution-making process in Poland, I would like to concentrate my presentation on the process of political and constitutional transformation in the Central and Eastern part of Europe. That part of Europe in the beginning of nineties was a kind of "laboratory" in searching for the "most adequate" form of government.

Analysing from this perspective, allows me to take into account the constitutional heritage in a double sense: first - as a common European heritage and second – as a constitutional heritage of individual states. This second aspect should not be neglected. Such an approach helps us to understand better what was the role of both traditions: European and national, in searching for the best, in a given country and in given conditions, form of government. From that perspective one can also better understand the importance of comparative arguments of the Venice Commission, (which was born in the beginning of the nineties), for the constitutional making process in various countries.

I would like to start with a statement, which could be seen as a kind of truism, but it was not so obvious in countries under communist power. Contemporary Europe is based on common political and economic institutions. These institutions could not, however, arise in such a shape, if not preceded by the common cultural history of Europeans, including also the record associated with legal and constitutional culture.[1] These specific ties, so important for the common European legal culture, were wholly cut in the part of Europe under the communist regime. This fact was of great importance for the perception of the constitutional heritage in this part of Europe. Countries in Central and Eastern Europe for more than forty years were exposed to a very specific experiment in the area of the organisation of the system of government. The common solutions concerning the system and form of government were imposed from above (strong centralism) to all countries in the soviet bloc. These common solutions were based on completely diverse principles than those, which were common for European (or broadly speaking) for western constitutional heritage. It was then the strong political will to create new a „real- socialist, (or better say communist), unified in burocratic way constitutionalism".

The question could arise here, whether the elements of this "real-socialist constitutionalism" can be included in the common European heritage? In my opinion no, despite the fact that they were in practice for so many years. The only reason for the negative answer is that the fundamental principles of this constitutionalism were contrary to the principles which created western European tradition.

They were as follows:

1. Recognition of the will of the state as essential to creating individual freedom (rejection of the personalistic concept),
2. Non-acceptance of the concept of human rights based on inalienable human dignity (all rights and even freedoms were understood as "given" by the state's authority),
3. The leading role of a single party, which meant the rejection of political pluralism,
4. Rejection of the separation of powers that limited the independence of judiciary.

This entire catalogue clearly shows that the communist constitutionalism was an attempt to construct a system alien to the European constitutional tradition.

---

[1] R. Buttiglione, J. Merecki SDS: *Europa jako pojęcie filozoficzne*, (Europe as a filosofical notion), Lublin 1996, s. 27.

The moment after the Soviet-influenced communist system collapsed, there emerged a general tendency to restore the traditional tenets of European constitutionalism. Those tenets were regarded as the cornerstone of a democratic order unlike the principles of socialist constitutionalism, which paved the way to an authoritarian system.

Both in the countries which were part of one state as the Soviet Union itself, such as for example the Baltic States, Ukraine, Georgia, as well as in those which were elements of a broader Soviet satellite system as in the case of Poland, Hungary, the Czech Republic, Slovakia, etc. - the tendency was to return to European democratic principles.

For that reason the idea of Constitutional heritage was one of the main points of departure.[2] The first step however was a need to discover existence and the real notion of the idea of common constitutional heritage.[3] Searching, rediscovering the elements of constitutional heritage became a kind of "founding myth (idea)" of new democracies in Central and Eastern Europe. That process was dictated by a clear drive to restore the European democratic tradition whose important element was constitutional tradition including all its attendant principles. That constitutional tradition or better say, heritage comprised principles which were the antithesis of those existing under communist rule, hence: principle of rule of law, the guarantee of human rights and freedoms based on the personalistic concept and human dignity, separation of powers, political pluralism, independence of the judiciary, constitutional justice.

The main challenge was to bring back the real meaning to all those notions, which in the system of real socialism often have had the same name but a completely different meaning.

In this context it was also significant that one of the common tendencies for all countries was the reference in the written text of the constitution to "natural law". The goal of such regulations was obvious. A discussion of the significance of natural law for the law-making process was a sign of the transition away from authoritarian systems in which the rights of individuals were dependent totally on the will of state authority. The new democracies would like to enshrine in their constitutions precisely those principles which were eliminated in the previous system, but which has been regarded as the foundation of a democratic order emanating from the European tradition. These include issues centering on the definition of the status of the individual and its dignity. For that reason one can find in many constitutions such wordings like in art. 30 of the Polish Constitution: "on inherent and inalienable dignity of human person" which were clearly rooted in the Universal Declaration of Human Rights.

Undoubtedly the common tendency to reform the political system was additionally conditioned by the fact that all those states intended to become members of Europe's organised structure – in first stage, the Council of Europe. As a result, there existed a strong, common tendency to accept legal solutions corresponding to what were regarded as European standards based on the European heritage. The Council of Europe generated standards of conduct that must be fulfilled by societies aspiring to be named as democratic or recognized as such. Adoption of these standards has to prevent or mitigate conflicts, as well as limit the use of violence against individuals and groups of reduced possibility to defend their own interest.

[2] It was organized in 1996 the conference in Montpellier on European constitutional heritage. See: *Le patrimoine constitutionnel européen,* Strasbourg, Editions du Conseil de l'Europe 1997;

[3] A. Pizzorusso, *Europejskie dziedzictwo konstytucyjne*, Wydawnictwo Sejmowe, Warszawa 2013;

The states of Central and Eastern Europe released from the forced direction of their development try to find their own identity associated with Europe. Reconciliation of different nations of the various parts of Europe was possible on the grounds of professing the same value and systems, and so basis for this was an admission and recognition by others, that they belong to the common European heritage and will follow the rule of law and the human rights and freedoms of their citizens.

Being the member of the Council of Europe teaches basic rules and understandings of the concepts in such a way that it is possible to communicate in one Europe, and when pronouncing the word "Heritage" it is possible to assume that we understand it in the same way.

Amid the arguments and entire phraseology of “returning to Europe”, the tendency to invoke constitutional tradition and to restore constitutional principles rooted in the European legacy has become one of the visible elements of the said return to Europe and in a broader sense of the return to Western democracies. The role of comparative arguments was of great importance. And here in this field the role of the Venice Commission played a crucial role.[4] The Venice Commission helped those countries to discover the European standards.

However, one should remember that individual states have travelled diverse roads prior to their transformation. Hence frequently arose the question precisely which specific structure, which specific form of government should be chosen when building a new political system rooted in the general, accepted principles of the common European tradition.

One can agree that this heritage influenced the form of governments but it would probably be difficult to say that it was the only factor that had decisive impact on the form of government.

Between countries there were those with stronger constitutional heritages and countries without such a strong constitutional tradition. Poland for example belonged to the countries with long constitutional tradition. The Polish Constitution of May 3rd 1791 (first in Europe) should be treated as part of the European constitutional heritage because was built on such principles like sovereignty of nation, separation of power with independent courts, guaranty of religious tolerance.

There is no doubts that the constitutional heritage had a significant impact on the basic constitutional principles that expressed such fundamental values as providing for: 1) the division and balance of powers, 2) political pluralism, 3) human rights, 4) independence of the courts. Common constitutional heritage had to a lesser extent its impact on the specific forms of government that allowed these rules to be carried out. The question how far the constitutional heritage influenced the form of government, was different in different countries.

Countries in the search of their form of government, tried to refer to their own constitutional heritage in the extent to which it was possible. In many cases, however, it could not suffice, simply for the lack of their own democratic tradition. For that reason the concrete historic political model to which a particular state could refer was often quite defective. As a result, one could observe that references to institutional solutions existing in the stable Western democracies proved stronger than to their own historic solutions, separated by constitutions of real socialism. Alluding to European standards in that area was an important reference point as well as a verifier of the process of constitutional reform.

[4] Some countries were invited to take part in the work of VC even before they became members of the Council of Europe (It was a case of Poland, Hungary, Romania).

Then solutions known from other countries (France, United Kingdom, Germany or even USA) were being adopted.

For this reason, one can observe that the solutions of governance gained, very often, rather eclectic forms. Most often they were based on the parliamentary system, as the one most rooted in the European tradition. But also different elements were introduced that deformed such a clear parliamentary system, they complemented it, or like it was called, had it rationalized. Often various institutions have been chosen from the individually known models which were considered democratic in the opinion of the constitution makers, and in the opinion of the various political groups in parliament. So solutions from different systems: semi-presidential, chancellor's, parliamentary were combined not always taking into account the consistency of the whole systemic model that had to arise as a result of such an eclectic composition.

One of these features for example was an adoption of the institution of direct presidential elections in the countries that did not have such a tradition. While on the contrary, they had a strong parliamentary tradition with a completely different model of government than in the presidential system. It had to induce tensions between different branches of power. It was of course free choice of individual countries. It should be noted however, that referring to the European heritage in the form of fundamental principles allowed consequentially for the use of eclectic solutions for specific forms of government. They were enclosed in a limiting framework constructed on the basis of the fundamental principles of constitutional heritage which aimed to prevent the system from turning to the authoritarian one.

As Loewenstein wrote years ago: "The history of constitutionalism is nothing more than man's quest for a limit on the absolute power of its bearers and an attempt to create a spiritually, morally and ethically justified authority as an alternative to subservience to the exiting power's absolutism."

And it was the main aim of the constitution-making process in this part of Europe. The concrete solutions, however, on how to guarantee it were more variable. The choice of concrete models, form of government depended strongly on the actual balance of political forces in each state.[5] Especially in the discussion on parliamentary or semi-presidential model, which was very significant in the Polish discussion, but not only in Poland. As L. Garlicki has correctly stated: "The Polish constitutional tradition [...] has always oscillated between a need for a powerful head of state and a fear of a dictatorship."[6] On the one hand, there was the longing for a strong Presidential power, but what proved still greater was the fear that this power may be abused.

[5] (Polish case) - As an effect in majority of new democracies the parliamentary system has been seen as the a crossroads between the Parliamentary/Cabinet system and the Presidential system. There was no agreement as to which of them constitutes our tradition. The advocates of both opposing concepts were right, whether they evoke the Parliamentary/Cabinet system and the March Constitution from 1921 or advocate the Presidential model of governance and the April Constitution from 1935. There can be no doubt that both models belong to Polish tradition.

The Small Constitution of 1992, while incorporating the bulk of the Parliamentary system, whereby current policies were the responsibility to the Cabinet headed by the Prime Minister, seeked to build into this system a generally elected President. Hence, the Presidential power--even if vested with many prerogatives nonexistent in the classical Parliamentary/Cabinet system formed on the basis of the March 1921 Constitution, such as the right to veto the laws passed by Parliament--is still a limited power on the executive level, given the existence of another element of the executive branch of government, namely the Cabinet with the Prime Minister.

[6] L.Garlicki*, The Development of the Presidency in Poland: Wrong institutions or wrong persons?*, in: Poland in a World in Change, ed. By K.W. Thompson, University of Virginia 1992, s. 67;

The eclecticism (even built on common standards) existed in different countries and was gradually broken as a result of the interpretation embedded on the basis of experience of a particular state and its own tradition, sometimes by the amendments to the constitution. But in some cases remains as an element of a new solution (for example the general presidential election in the parliamentary system).

The conviction or perception that the presidential system does not fit well within the European constitutional heritage now seems to be slowly changing in some countries. But in other countries seems to be slowly introduced. And it is not only the problem of the changing of the form of government. It also leads to the change of the system of principles especially concerning the separation of power and role of the judiciary. And this problem is strongly pointed out in many opinions of the Venice Commission.

In this sense it is not only a free choice but also a strong turning back from constitutional heritage. The question arises how strong this tendency is now in European countries.

One of the most significant elements, in so-called "new democracies", is the lack of constitutional customs. Conventional norms of constitution include particular behaviours, fixed forms of conduct that are shaped against the background and under applicable provisions of the constitution. Not everything can be inscribed in the Constitution. All attempts and efforts towards this are futile. The constitution would then grow too detailed and become its own commentary.

The history of all countries with a permanent constitutional tradition teaches us that the so-called constitutional customs have their role to play. Yet, in order to allow such practices to be shaped, it is necessary to keep the constitution in force, un-amended, for a longer period of time. In the face of constantly changing legal status and - what is worse - fluid concepts of systemic models it becomes difficult to have clear customs formed, i.e. behaviours, which have been shaped over the decades and belong to a specific systemic tradition.

In this context one needs to stress the role of a constitutional justice, which seems to be now one of the hottest problems. One may raise a question of whether constitutional justice belongs to the common European heritage. The only answer, in my opinion is yes, at least since the end of II World War. Constitutional justice is the key component of the system of checks and balances in democratic states.[7] The historical experience of West European states shows that the success of democracy is intimately linked to the creation of constitutional courts. Contrary to the previous authoritarian systems though, what this really means is the supremacy of the law over politics. Constitutional law and order may only build its authority on the new authority of law .[8] Constitutional justice is one of the pillars of the rule of law, or something which may be defined as the "load-bearing wall" of the whole system.[9]

It is not important whether such tribunals, courts exist in all countries or only in some countries, what is important is that the principle of constitutional justice be accepted by all countries. The concrete model of such institutions is not so important. Important is its autonomy and independence, that such a control is seen as one of the crucial elements of a system of separation and of the check and balance system. Fundamental importance of

[7] CDL-AD (2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges (including an explanatory note and a comparative table) and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 76.

[8] S. Ruelke, *Venedig-Kommission und Verfassungsgerichtsbarkeit*, Georg-August-Universitaet Goettingen, Institut fuer Voelkerrecht, Dissertation , pp. 104-107.

[9] H.Suchocka*: Opinion of the Venice Commission on the place of the Constitutional Judiciary under the rule of law in a democratic state*, RPEiS 2016 nr 1.

such courts is that they establish a new sphere of balance. This balance means that even the parliament as legislator can be under the control of such a court acting as a guarantor of constitutionality of legislative power of the parliament.[10]

With regards to democratic traditions, it must be stated that the countries of Central and Eastern part of Europe did not have the historical opportunity to develop a mature, democratic culture. The majority of them did not have the possibility of developing their own political system at a time when the democratic systems of Western Europe were becoming stabilised. The dichotomy between an attachment to democracy on the one hand and the extent of democratic behaviour on the other led to a very weak psychological infrastructure of democracy in those societies. Sometimes the development of quasi-democratic attitudes over an extended period of time may turn against true democracy. It was clearly pointed out in the work of the Venice Commission, for example on the role of the Judiciary and relations between executive and judiciary power in some countries.

An instrumental approach to the law is one of the chief threats to democracy in the second stage of transformation. A state order in which the constitution is treated instrumentally as a tool for achieving political aims is a bad state order. A perception of the law solely as a method of achieving one's own group's or party's political objectives is incompatible with the principle of the rule of law.

The manner (mode) in which some modifications have been introduced into several constitutions in recent years[11] have brought the Venice Commission face to face with the problem of restoring the meaning of mechanisms of proper law-making, including the proper drafting and amending of constitutions – a matter to which such importance had been attached in the early years of transformation. One of the main goals of transformation had been to break with the concentration of power and allow the voice of minority parties to be heard. Twenty-some years after the start of the transformation the problem of a "democratic" version of power concentration has made it appearance – concentration achieved as a result of elections and the acquisition of a qualified majority capable of changing the constitution. That may give rise to the temptation of not reckoning with other political forces. That may block the creation of pluralism and obstruct the balance of political forces and state organs.

Owing to the experience of the communist past as well currently emerging tendencies in some post-communist states to deform the principle of division of power, that principle should be regarded as the basic element fostering pluralistic attitudes and negotiating mechanisms as well as seeking compromise even 25 years after the start of transformation. At the outset of transformation, that principle was merely a certain idea or slogan. At present, it has become a necessity preventing the resurgence of new authoritarian systems, although under democratic conditions such a development may appear paradoxical.

Although more than 25 years have gone by since the beginning of the transformation, remnants of the previous authoritarian thinking remain in some countries and a new not fully democratic phenomenon is occurring in many countries.

Over the past 25 years new areas and new problems have appeared, posing new challenges unknown or unrecognised in the early years. They compel one to seek answers to questions arising also in the realm of constitutional reform and regulation.

---

[10] J. Zakrzewska: *Spór o konstytucję*, Warszawa 1993.

[11] Venice Commission expressed its view clearly that : "Frequent constitutional amendments are a worrying sign of an instrumental attitude towards the constitution as is the resort to the exceptional two-thirds majority in constitution-making without a genuine effort to form a wide political consensus and without proper public debates." (CDL-AD(2011)001).

What about the European Constitution?

When we discuss the issue of constitutional heritage, and internationalisation of the constitution, we have to touch the problem of a European Constitution.

The question arises: Are we today closer or further from the idea of a common European Constitution. Maybe we lost our "constitutional moment" on the European level? „In the history of all polities there are memorable „constitutional moments" associated in the collective mind with important changes in the constitutional order. The change may be direct and formal, touching on the constitution itself such as a very consequential amendment or resettlement(…) or very important judicial decision interpreting the constitution."[12]

Or maybe our common constitutional heritage was not strong enough to help us to find bases for making European constitution. Is it still possible and worth it to discuss the common European constitution? This discussion now seems to be dead, but is it closed forever?

The experience with the European Constitution is not the best one for being optimistic regarding the future Europe base on common heritage. This case clearly showed that countries, not only the new ones, but also so called "traditional democracies" were not ready for the common act.

But especially the new countries they were so opened to accept the common European heritage as its own in the beginning of the transformation, now prefer to keep their own tradition defined in different, not always very coherent ways. Now we can hear more and more voices neglecting the standardisation of Europe. But what this means is not yet clearly apparent. We should agree that this approach should not neglect the fundamental principles. And maybe it is now more important than 25 years ago to make a clear division between principles, fundamental principles and concrete institutions. And the Venice Commission would like to do it, pointing out always between European standards and individual solutions, based on the margin of appreciation. It is a strong need for common principles rooted in European heritage, but the space should be left for different forms of institutional organisations, even in the form of government.

As I wrote several years ago, I can only repeat now: A constitution should spawn a sense of constitutionalism in the society, a sense that it truly is a fundamental document and not simply an incidental political declaration. Only when such a perception of the constitution takes root and proliferates in the consciousness of the political elite and all of society, can it be stated that its provisions are functioning restrictively. Only then can it become a guarantor of the individual rights and conduct of state organs set forth in its text and truly become the foundation of the state's democratic order. In order for constitutional norms to effectively limit power, the awareness must exist in society and amongst the political elite that the constitution truly is a legal act which clearly organises public life. A constitution's permanence may not be based solely on arithmetical considerations stemming from the relationship between the numerical strength of the ruling and opposition parties in parliament.[13]

[12] J.H.H Weiler, *The Constitution of Europe*, Cambridge, University Press 1999, p. 3.

[13] H. Suchocka: *The role of the Constitution in the Creation of a Law-Governed State*; in: Liber Amicorum Antonio La Pergola, ed. P. van Dijk, S. Granata-Menghini, Juristfoerlager and Lund, Lund 2009, pp. 287-296.

Hence, both the manner in which it is adopted as well as the way it is deployed must create in society the conviction that by its very nature, the constitution is a stable act not subject to easy change under the influence of changing political climates. Only then can it become a guarantor of the individual rights and conduct of state organs set forth in its text and truly become the foundation of the state's democratic order.

Otherwise there may occur, what one of the stakeholders of Poland's constitutional debate in the beginning of the transformation referred to, as politics devouring the constitution.