REFLECTIONS ON THE CONSTITUTIONAL ASPECTS OF THE RELATIONS BETWEEN CHURCH AND STATE IN EASTERN EUROPE

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I. It is a well known fact, that currently all the former so-called socialist countries, including the former constituent republics of the former Soviet Union, are undergoing a process which is generally considered one of the most comprehensive and far reaching overhauls of their constitutional and legal structures during the last couple of decades of their postwar histories. The crucial changes which the constitutional and legal frameworks of the Eastern and Central European countries are undergoing cannot be separated from the previous constitutional and legal experiences in this geographical part of the European Continent.

In this respect, one should particularly take into account the question relating to continuity in legal matters in Russia and the Soviet Union. According to the statement of Stuchka "Communism means not the victory of socialist law, but the victory of socialism over law, since with the abolition of classes with their antagonistic interests, law will die out altogether." The nihilistic approach towards law did not have, at least in the formal sense of the concept of law, any effect upon constitution-making in the Soviet state. The constitutions of the Soviet Union i.e. Soviet Russia (1918, 1924, 1936, 1977) regulate almost exhaustively the relations of the Soviet citizens.

It is worth mentioning the idea of the so-called "socialist legality" playing a considerable role in the field of the judicature throughout the history of Soviet law. Legality (zakonnost') is rooted in the concept of legality known in the czarist Russia. Historically, legality meant, roughly speaking, strict obedience to the commands of the emperor and thus narrowed considerably the independence of the judiciary. This later also characterized the entire communist era of the Soviet Union *mutatis mutandis*. There were other legacies as well, like the intense formalism characterizing the Soviet law, the secrecy of legislative and judicial procedure and the dominant position of different kinds of corruption in the resolution of legal questions. As a result, constitutionalism by no means meant substantial or real constitutionalism.

II. Another typical feature of Russian or Soviet "constitutionalism" is that the Church has never been substantially separated from the state. The decree issued on 23th January 1918 ("Decree on Separation of Church from State and School from Church") laid down the principles (in just 13 short articles) of the relationship between Church and state. That decree, based mostly on a draft made by Lenin himself, has been decisive for the greater part of the communist history of Russia and the Soviet Union. It is, no doubt a striking fact that Lenin modified the title of the draft beginning with the words

"Freedom of Conscience". Another fact to be mentioned is that the draft's first paragraph "Religion is the private affair of each citizen of the Russian Republic" was deleted, obviously quite intentionally, by Lenin. These two facts *per se* are characteristic of the bolshevik type church-state relationship in the recently born Soviet Russia. The state denies any kind of independence of the Church form the State on an institutional level. The church-state relationship is still characterized by the chaotic state of legislation. Suffice it to think of the Legislation on "Religious Associations" (Zakonodat'elstvo o religioznykh kultah of the Russian Socialist Federal Soviet Republic) which contains more than one hundred valid acts including departemental ones. Many of them were hardly available in other officially published sources.

Thus, on the one hand the chaotic state, on the other hand the secrecy of legislative and judicial procedure characterize the legal regulation of the church-state relationship. As a result the provisions of the four constitutions of Soviet Russia and the Soviet Union, the same relates to the provisions contained in the constitutions of the constituent republics, where were no real guarantees against the state's interference into church affairs existed. In this respect it is worth mentioning that to some extent the field of activity of the church, with passage of time, became more and more limited. E.g. the 1918 Constitution of Soviet Russia guaranteeing the general right of religious education has been modified in a more restricted way in the text of the 1924 Constitution of the Russian Socialist Federal Soviet Republic.

Religious tolerance has never been a trademark of either Russian or Soviet legislation. Freedom of religion has never entirely existed in that part of Eastern Europe. The Basic Laws of 1906 enacted in czarist Russia did not contain provisions for guaranteeing religious freedom, either.

III. From the historical viewpoint, the situation in this respect was almost diametrically opposite in Hungary and Poland.

After the battle of Mohács in 1526 the unity of the kingdom of Hungary was lost. The central areas were invaded by the Ottomans, the Northern and Western parts were called Hungary under the Habsburgs and the Eastern parts, Transylvania and the adjoining Partium, formed a new principality. Its rulers – performing a tightrope dance between the Ottomans and the Habsburgs – were able to achieve a considerable measure of independence in what remained of historical Hungary in the East. In its splendid isolation from the powerful Catholic kingdoms of the west, Transylvania was the breeding ground for various trends of the Reformation.

The law on religious tolerance was inspired by the Unitarian bishop Francis David who had a strong spiritual influence on Transylvania's young ruler, John Sigismund. He endowed the small villages and town communities with a yet unprecedented religious freedom by allowing them to invite preachers they liked. "No one can force them to accept someone whose interpretation of the Bible is against their understanding" – the law said. "Faith is the gift of God coming by hearing the words of God" and accordingly the faith of the landlord was no longer important. His people were free to choose their faith in line with the inner voice of their own souls.

The fact that John Sigismund, the Unitarian grandduke of Transylvania, in accordance with the decision of the Diet, granted religious freedom to Catholics, Lutherans,

members of the Reformed church, and Unitarians, was unprecedented. It is to be noted that the name Unitarian gradually came into use after debates at Gyulafehérvár (currently in Alba Iulia, Rumania) in 1568 and at Nagyvárad (currently Oradea, Rumania) in 1569. In January 1568, the Hungarian parliament in the Transylvanian town of Torda declared that the followers of the four predominant religions of the realm – Roman Catholics, Lutherans, Calvinists and Unitarians – enjoy equal rights. To make a comparison, let us remember the same year 1568, when Elizabeth I ordered the imprisonment of Mary Stuart in the Tower of London, when stakes lighted in Spain burning heretics by order of the Holy Inquisition, when in Italy the best scientific thinkers of the age were forced to withdraw their teachings because they were irreconciable with church doctrine.

For many years this was the most enlightened law on the freedom of thought in the world. The Transylvanian diet held at Torda gave these four established religions *(religiones receptae)* constitutional recognition in 1571, shortly before John Sigismund's death. The provisions adopted and proclaimed by the Diet of Torda were undoubtedly the first legally binding provisions providing for equal treatment of all existing religious denominations in history of Europe.

In all fairness we owe one more comment to this undoubtedly paramount historical event. This religious freedom in its boundless totality was short-lived. The next reigning prince of the Principality of Transylvania was the powerful Stephen Báthori, a Catholic who simultaneously became one of the most celebrated kings of Poland. Under his reign the counter-reformation started and the reformed churches of the country had to endure strong opposition.

Still, the existence and the possibility of subsequent references to the law adopted by parliament was enough to finally curb later outbursts of religious intolerance.

The idea that no one could be prosecuted for his/her religious belief was made into a legal act in Poland as early as 1572. The then Chancellor of the Kingdom of Poland, the principal maker of the Polish political experiment known as "the Royal Republic",[1] Jan Zamoysky, who was an excellent lawyer as well (he studied in Paris, Strasbourg and Padova) made the following statement: "I would give half of my life if those who have abandoned the Roman Catholic Church would voluntarily return to its vale: but I would prefer giving all my life than to suffer anybody to be constrained to do it, for I would rather die than witness such an oppression." This statement of the outstanding Catholic statesman of Poland characterizes quite well the political atmosphere relating to religious tolerance in the last decades of the 16th century Poland. Of particular significance is the declaration of King Sigismund Augustus, the last of the House of Jagiellons, made at the session of the Diet: "I am not the King of your souls."

On behalf of these two historical facts, it is quite obvious that Christian thinking played quite a considerable role in some of the Central European countries in the domain of constitutionalism. Constitutionalism is meant, of course, in a rather broad sense of the word. The emergence of the idea of equal treatment of all religious denominations can be regarded *per se* as a certain kind of loosening of the connections between Church and State. That phenomenon was closely linked to the relatively "liberal" political climate in both countries. Forcible conversions to Christian religion were regarded in that

particular period of time (in the second half of the 16th century) as immoral and, let us add to it, illegal or "unconstitutional" *(fides ex necessitate esse non debet)*. The so-called "Monarchia Moderata" provided the political and constitutional basis for the limited separation of Church from State reflecting a genuine Christian way of thinking. The theoretical as well as ideological basis for it was undoubtedly of Christian inspiration. Noteworthy is in this respect in particular the memorial entitled *"De potestate papae et imperatoris respectu infidelium"* written by Paulus Vladimiri, who was professor of the University of Cracow. That memorial dating back to the Council of Constance (1414–1418) contributed considerably to the process of gaining ground of religious tolerance and, one could say, of religious pluralism, although the latter term may seem at first glance a bit exaggerated.

IV. Current problems of constitutional change in Eastern Europe are closely linked to the fact that the post-war constitutional experiences in the countries of the Eastern part of the European continent were most dissatisfying. The socialist-style constitutions have not been legally binding sets of norms. They could be regarded as political-philosophical declarations thus having a predominantly aspirational character. The major reason for this lied in the fact that they operated without the extra-parliamentary means of constitutional control.

Currently we are witnessing the expansion of constitutionalism in Eastern Europe, although in some countries, for instance in Hungary, no new constitutions have yet been adopted. In Hungary the national assembly substantionally amended and motified the 1949 socialist-style Constitution bringing it into in compliance with the far-reaching political and economic changes. In Latvia where the parliament re-promulgated, with some minor modifications, the 1922 Constitution, we are witnessing a return to the interwar constitutional experience. One of the characteristic features of the new constitutions is the deletion of articles providing for the special treatment of the communist party.

Another characteristic feature of the recently promulgated constitutions is the re-emergence of the idea of the separation of powers dating back to Montesquieu. The mere fact that this idea has reappeared helped a great deal to separate the Church from the State. The separation of the legislative and the executive branches of power *per se* has made possible the limitation of the opportunities for interference by the State in the internal affairs of the Church. History proved that the declaration of the separation of Church and State is far insufficient in a State based on the so-called unity of power vested, supposedly, in the people. The creation of an independent judiciary is a further guarantee of the reattainment of the independence of the Church.

V. We would like now to dwell a bit on the judicial branch of power. In most European countries, a Constitutional Court has been established. In this respect, we cannot forget that that kind of political and judicial controlling organ is deeply rooted in the Christian way of political thinking. Suffice it to think of the "Tribunale politico" ("Political Tribune") conceived by the great Christian philosopher, Antonio Rosmini (1797–1855).[2] In order to defeat injustice, it is necessary to establish such an organ as proposed by Rosmini. Rosmini emphasized the extreme significance of the "Tribunale politico" in the transition from absolutism to democracy. The prominent Italian Christian

philosopher of Rovereto regarded this political and judicial organ as the supreme power of the state guaranteeing the implementation of the political rights of the citizens. The "Tribunale politico" can, according to his view, challenge even acts adopted by the legislature. It is extremely interesting to note the impact of the Rosmini's concept of a "Tribunale politico" on the functioning of the Constitutional Court e.g. in Hungary. The Hungarian Constitutional Court which has been brought into being on January 1, 1990, can be regarded to some extent, at least substantially, as an implementation of Rosmini's idea for a "Tribunale politico".

Judicial review, labeled by the procurator general of the Soviet Union, Vishinsky as a "reactionary institution" is being initiated (or re-initiated) in Eastern Europe. There exists once again institutional control of the constitutionality of acts of the legislature and of the legality of administrative acts. Theoretically, the review of legality of administrative acts existed in the Soviet Union as article 58 of the 1977 Constitution provided for it (according to subsection 1 of article 58: "Citizens of the USSR shall have the right to appeal the actions of officials and of state and social agencies. Appeals should be considered in the procedure and within the period established by law."). Due to the lack of existence of administrative courts, however, this provision could hardly be implemented. Administrative tribunals are being brought into being in most Eastern European countries in compliance with both the new or amended constitutions.

The courts have regained their independence, which is an essential prerequisite for their appropriate functioning. The judges are no longer required to judge in compliance with their "revolutionary consciousness" as they were supposed to, particularly in the case of the lack of legal regulation. Besides constitutional declaration, real guarentees have been established on institutional level. The judge is allowed to judge according to his/her own (Christian) consciousness. There is of course no provision rendering sentencing in compliance with Christian consciousness, but implicitly this is, no doubt, possible. This issue is also connected with the relationship of justice with charity.[3]

VI. The postwar period in Eastern Europe has been characterized by the elimination of the institutions of a civil society. In conformity with that, the state tried everything in order to destroy the institutional network of the various religious denominations. The negative consequences of this attitude of the state towards the various institutions (schools, hospitals, higher educational institutions etc.) run by the Church are still discernible in some Eastern European countries. Aside from this, one has to mention the destruction of the former "mediating structures" (referring to the term used by von Laue). The Church suffered in particular because of this destructive process which lasted for several decades.

The constitutions of the Eastern European countries enacted after World War II defined state authority as belonging to the people and proclaimed equal rights for all citizens, including freedom of religion, speech, association and assembly.

The first post-war constitution of Yugoslavia (promulgated in 1946) guaranteed freedom of conscience and religion to all citizens (article 25) and declared the separation of Church and State. The 1946 Constitution had provision relating to freedom for religious communities to engage in religious activities for the purposes of religion. The 1946 Constitution forbade the misuse of religion for political ends. Besides that, the

creation of political organizations on a religious basis was also forbidden. By virtue of these provisions the "mediating structures" of the churches became almost entirely eliminated. The act adopted in May did not substantially improve the situation of the various religious communities. The state still had a large number of legal means to place the church/es/ under its strict control. The inclusion of the priests and their family members in the state system of insurance and the grants the state made to the various religious communities for the maintenance of their educational institutions for theological study were able to strenghten state control. All of the above measures served exclusively for the purpose of strenghtening the control of the state over the church/es/ and thus were in conflict with the principle of separation of Church and State.

The curtailment of the political power of the church can be regarded as a corollary of the separation of Church and State. It must, however, be emphasized that in a democratic state the curtailment of the political and temporal power of the church cannot be mistaken for deprivation of the means necessary to carrying out various educational, charitable etc. activities of the church. This is in perfect conformity with Christian ideas. In the new or substantially modified (amended) constitutions of the Eastern European countries special provisions guaranteeing the free exercise of various activities of the church have been included. A new economic and political constitutional framework has to provide for the real possibility of various church activities which do not conflict with the idea of separation of Church and State. The reason we refer to the early post-war Yugoslav experience is that even is a state still having diplomatic ties with the Holy See (the diplomatic relations were temporarily broken in 1952) Church-State relations were extremely troublesome on practical levels.

VII. It is in conformity with Christian ideas that a religious group has sufficient economic means to carry out its ends. The "revolutionary" changes that occurred in the field of property relations in the Eastern European countries almost entirely deprived the church of its economic means. The liquidation of private ownership hurt the church in particular in all these countries. Church property was taken away with no compensation under the pretext of the nationalisation of the means of production. Lenin's idea about law ("A law is a political instrument; it is politics") was implemented in particular in the process of taking away property from both individuals and church/es/. The interpretation of law by Vyshinsky ("Law is no 'enigmatic shape' but a living reality expressing the essence of social relationships between classes") was taken quite seriously in the Eastern European countries in the post-war period. In the expropriation of ownership there was not even a legal disguise in order to embellish the pure reality (unlike the constitutional "guarantees" providing for the freedom of religion).

The major requirements concerning regulation with regard to ownership have to be adopted in the new constitutions. Property relations have to be regulated in a normative way. Second, all forms of property have to be equally protected. Third, real guarantees against the state's interference have to be incorporated in the text of the constitution.

The Christian concept of ownership underscores the social-responsibility of property. In this respect, in particular with regard to history is worth mentioning the work of Renous-Zagame.[4] This concept is in no doubt in accordance with the requirement of moral foundation of law.[5]

Duties of property have been emphasized by a number of encyclicals. Suffice it to think of the encyclicals of *Rerum novarum, Quadragesimo anno, Sollicitudo rei socialis* and *Centesimus annus*. The statement made by the Pope Gregory the Great (590–604) is from this viewpoint still of considerable significance. He made clear that charitable activity towards the poor constitutes for Christians an obligation in conformity with both morality and justice. Social responsibility of all forms of property is considered as one of the axiological principles based on Christians ideas. As a result, the drafters of the new constitutions in Eastern Europe have to take this into account. The clear reference to social duties of property should be inserted in the general provisions of the constitutions of the countries of Eastern Europe as being in complete accordance with the social engagement of the Christian Church/es/. The same is valid for provisions to be enacted which protect the institution of marriage and family, providing for social welfare, recognizing and enforcing the right of the citizens to a healthy environment and the like.

Christian churches have to unfold their activities mostly in the "private sphere" on an institutional level according to the new constitutions in Eastern Europe. The constitutionally guaranteed private rights of the church will certainly encompass a growing number of activities in conformity with the manifold engagement of the latter in the civil society to be brought about in the near future. Private activities of the Church cannot be subject of restraint. They must be protected by constitutional provisions. Contrary to the communist period, no limits will be put on private economic and social activities. In this respect, one has to bear in mind the instruction of Lenin to the compilers of the 1922 Russian Civil Code which is as follows: "We do not recognize anything 'private'; for us, everything pertaining to the economy is a matter of public and not private law... Hence, we must enlarge the interference of the State with the relations pertaining to 'private' law, enlarge the right of the government to annul, if necessary, 'private contracts' and to apply to private law relations not the corpus iuris romani (sic! G. H.), but our revolutionary concept of law." The catastrophic consequence of the implementation of the "revolutionary concept of law" is quite obvious today. Constitutional provisions guaranteeing predominance of the "ius privatum" will undoubtedly be in accordance with the Christian concept of law closely linked with the concept of freedom developed by Christian thinkers.

VIII. In the new constitutional and political system of the Eastern European countries relations between the individual and society (the state) will have to be brought into harmony with each other. Christian thinkers do not regard conflicts existing between individualism and collectivism as irresolvable ones. Overemphasizing contradictions between the individual and society (the state) is unacceptable for Christian thinkers. The former way of thinking leads necessarily, as this has been the case in the period of communism, to totalitarianism. Christian concept of democracy is, undoubtedly, able to establish an equilibrium between individualism and collectivism. For successful constitutional engineering in Eastern Europe, after the fall of the period of totalitarianism, it will be advantageous to take seriously into account the Christian concept of human freedom rooted in the Gospels. This concept could constitute the theoretical basis for a legal conceptualization of the social, political and economic rights and duties of the citizens in Eastern Europe, in the framework of constitution making.

1 See Grzegorz L. Seidler – Jan Malarczyk: Experiment in Political Organization in Renaissance Poland. In: Diritto e potere nella storia europea. Atti in onore di Bruno Paradisi vol. I. Firenze, 1982, 513.

2 See A. Rosmini: Della naturale costituzione della società civile, 1827.

3 See R. Pizzorni: Giustizia e carità, Pontificia Università Lateranense, Roma, 1980.

4 See M.-F. Renous-Zagamé: Origines théologiques du concept moderne de propriété, Droz, Genève-Paris, 1987.

5 See in this regard the works of Friedrich Adolf Trendelenburg (Die sittliche Idee des Rechts, Berlin, 1849 and Das Naturrecht auf dem Grunde der Ethik, Leipzig, 2nd ed. 1868).