

Standards of Europe's Constitutional Heritage*

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First of all, let me thank the Constitutional Court of the Republic of Lithuania for having invited me as a member of the Venice Commission to make a presentation in the frame of an International Conference devoted to the Standards of Europe's Constitutional Heritage in the occasion of the official celebration of the XX Anniversary of the Constitution of the Republic of Lithuania. Taking into consideration the topic chosen for the Conference I made the proposal of dealing with the relation between the European constitutional heritage and the National constitutional heritage of the European countries. Both these concepts are at the core of the activity of the Venice Commission as far as this body is entrusted with the task of developing the common legal traditions of the European countries through the elaboration of the contributions which are given by all the concerned States on the basis of their historical constitutional identity. The topic would certainly require more time than the twenty minutes assigned to me by the

organizers but I'll try to summarize my conclusions on the mentioned items taking specially into account my personal experience as a member of the Venice Commission which have had sometimes difficulties in dealing with references of constitutions and laws of the interested States to their old legal institutions. For instance, which is the meaning of art. 131 of the Russian Constitution according to which local self-government shall be exercised "with regard for historical and other local traditions?" Or which are the consequences of art. 13 of the Bulgarian Constitution which considers the Eastern Orthodox Christianity "the traditional religion in the Republic?" What does eventually the reference to the spiritual bequest of Cyril and Methodius, and the historical legacy of Great Moravia mean in the preamble of the Slovak Republic?

As a matter of fact the Venice Commission adopts the European constitutional heritage as a yardstick in the elaboration of its opinions and of the exercise of its consultative support aimed at facilitating the con-

stitutional reforms and the implementation of the constitutions in its member States. The Commission obviously takes part in the elaboration of the concept in view of the necessities of the different national constitutional practices, but it draws inspiration by the developments of the European transnational law and by the case law of the two main transnational Courts, which have today a significant but different role in Europe, that is the European Court of Justice and the European Court of human rights. According to the prevailing legal literature the European constitutional heritage is made up not only by the European treaties and conventions in the field of the human rights and rule of law, but also by those principles which have been at the basis of the historical process of gradual growth of the legal orders of the European States. Therefore the concept covers at the same time the legal provisions which have been in force in those legal orders and the scientific elaboration of them which has supported their implementation and their development. This definition implies that the terms of reference of the concept are, on one side, the normative experience of the European countries and, on the other side, the doctrines and the theories which have prepared and supported this experience.

If these are the elements which underpin the elaboration of the concept of the European constitutional heritage, it is evident that the European States give a contribution to the formation of that heritage as far as they are in the position of offering the concrete evidence of both an actual, past and present implementation of the principles of the constitutionalism and of the scientific contribution in the elaboration of that practice. Moreover these two elements should be common to at least the

majority of the interested countries, they cannot be the fruit of the isolated and individual experience of a single State. They have to be shared by a great deal of the European States. Therefore to the formation of the European constitutional heritage take part, or – better – have taken part all the States where the principles of the constitutionalism are deeply rooted, that is the States where those principles appeared at the horizon of the legal order and largely contributed to the creation of the modern and contemporary constitutional institutions. Therefore the participation of the countries to the formation of the European constitutional heritage should have been possible as far as they have gotten involved in the building of the modern state. But, if there is a common understanding that the documents and the events which have to be taken into account are those occurred in Europe after the French Revolution, my presentation will also deal with documents and events which preceded the advent of the Enlightenment.

At this stage of our reasoning we have to keep in mind that, according to the opinion of the late Harold Berman, the birth of the modern state in Europe coincides with the pontifical revolution of the Pope Gregorius VII in the eleventh century, when the emphasis on the separation of the Roman Church from the civil authorities opened the way to the take off of new legal doctrines in the frame of the newly established European Universities. It is not by chance that the origins of the modern State are contemporary – as Maitland stressed – with the advent of the new legal European schools. The scientific doctrines and theories offered the necessary support to the elaboration of the concepts of the State and of their authority

and institutions, which were influenced at the same time by the rebirth of the Roman law and of the growth of the Church law.

But we cannot also forget that the great Italian legal historian Antonio Marongiu reminded us that, while in France the authority of the King was restrained by the traditional and customary *lois fondamentales*, with the autumn of the Middle Age the idea of limiting the powers of the kings and of the princes through agreements stipulated with the nobles or with the gentries was taking roots. The example of the *Magna Carta* (1215) is not isolated and was followed in Central and Eastern Europe by the contemporary Golden Bull in Hungary (1222): both of them should deserve a special consideration in view of the constitutional processes they started. But if you look at the history of these two documents, we can ascertain a great difference in the attention paid by the scientific literature to them. Notwithstanding the fact that they are – as I told you – contemporary, the *Magna Carta* is very frequently quoted in every quarter of the European legal science as one of the main sources of the European constitutionalism, while the Golden Bull is frequently forgotten and, in any case, it is rarely mentioned as a constitutive element of the historical tradition of the European constitutionalism.

This difference certainly depends on the contents of the two documents. It is true that the *Magna Carta* stayed in force for a short period of time while the Golden Bull is supposed to have been a stable element of the continuity of the Hungarian legal history. But it is also true that the efficacy of the *Magna Carta* was frequently renovated in the following years, many times with many changes. Moreover the English document certainly is principally aimed at insuring

privileges and special rights for some persons and classes, but at the same time it reveals, for instance, a great attention to the protection of all the persons of the kingdom and opens the way to the universality of the modern theory of the protection of the human beings. On the basis of its clause the *Magna Carta* guarantees a general extension of the protection insured by the customs and freedoms which it mentions, by requiring their compliance by “*tam clerici quam laici... quantum ad se pertinet erga suos*”, that is by recognizing that guarantee to all the people who were subjected to those *clerici* and *laici*. On the other side, the Golden Bull was certainly inspired by a restricted idea of the freedom which was partially connected with the fruition of the land and was strictly limited to the guarantee of the privileges of the ruling class. Some judges tried, under Mathias Corvinus, to extend the protection of the Bull to other persons but this case law was rejected and overruled with the advent of the Jagellonis. Therefore many authors share the opinion that, while the *Magna Carta* reveals an effective orientation towards the establishment of the principles of the modern constitutionalism as it is confirmed by the following developments of the constitutional history of the United Kingdom, the Golden Bull certainly – as Bonis said – “paved the way for further development”, but it was “the basis of the Hungarian corporative constitution”, which was definitely inspired by principles different from those which are at the core of the modern and contemporary European constitutional heritage.

If we compare the different developments which I described, we can find the confirmation of the remarks made some years ago by prof. Jarasiunas, who explained

the fact that in the European historical legal literature Central and Eastern Europe is described as having a peripheral character in respect to other parts of the European constitutional civilization because "the history of these countries are the permanent experiments to reach better developed Western countries... and the historical reality of this region of Europe are the gaps in the statehood, national calamities, social and economical lagging behind".

A fact specially impresses the scholar who devotes his attention to some of the institutions which are – according to the opinion of Jarasiunas – "paradoxical subjects – unpredicted achievements of the political legal system" of the countries of the area. They are not studied as a part of the European common constitutional heritage. Their experience, even when it covers many centuries as it has happened to the tradition connected with the Hungarian Golden Bull, is not considered by the majority of the authors as a constituent element of the European constitutional tradition. Only those documents and institutions which are at the basis of the constitutional developments, for instance, of United Kingdom and France or, in more recent times, of Belgium, Italy and Germany are studied and elaborated in view of the assessment of the common developments of the European constitutionalism. The impression is that only States successfully established since a long time according to the principles of the constitutionalism are considered as adequate terms of reference for the elaboration of the European constitutional heritage. For instance, even the Polish Constitution of 3 May 1791, notwithstanding its European priority after the American Constitution was adopted, has not been the subject of a special attention and

elaboration in view of the construction of the European constitutional traditions. It is true that it had been in force for a very short time but it is also true that it was the sign of the diffusion of the ideas of the Enlightenment about the human rights because it was specially aimed at guaranteeing not only the privileges of the gentry and the rights of the burgers but also the protection of the law to the peasants. Some elements of its content would have probably deserved to be taken into account even before the fall of the wall which interested Poland at the end of the past century, but the sad developments of the history of the Polish State probably prevented its consideration by the doctrines and the theories which are the basis of the scientific and judicial elaboration of the European common constitutionalism.

Does this fact oblige us to deny the existence of a Polish constitutional tradition? Certainly this is not the opinion of those Polish scholars and intellectuals who are interested in keeping alive the historical tradition of the efforts made by the Polish people to safeguard the Polish identity in the frame of the European experience vis a vis the other European States and peoples. And they are correct, their position deserves our attention. Nobody is allowed to deny that documents which have the historical characteristics of the Hungarian Golden Bull or of the Polish Constitution of the year 1791 have had a precise function in the development of the legal culture in the respective country as far as they are a positive factor of the recognition of the identity of that country.

It sometimes happens that we can find a quotation of such a document or of more than one of the same peculiar relevance in the preamble of the national constitutions. While the preamble of the Czech Constitution makes a

generic reference to the “sound traditions of the ancient statehood of the Crown of Bohemia as well as of Czechoslovak statehood”, the preamble of the Georgian Constitution mentions not only the “centuries-old traditions of the Georgian Statehood” but also the “main principles of the 1921 Constitution”. Especially interesting is the case of Croatia, that is of the preamble of the national Constitution of Croatia, which opens the text of this document and precedes all its provisions making references to important events of the history of the Croatian people and of deliberations of the Croatian Sabor in the past centuries. All these references are aimed at confirming and supporting the “historical, national and natural right of the Croatian nation” to its identity and to the exercise of its state sovereignty. The specific destination of this preamble and of its quotations which look strictly connected to our research, makes their utilization in view of the elaboration of the European constitutional heritage very difficult as far as the individual claim of the Croatian people to sovereignty is essentially at stake. I don’t want to say that that claim was unfounded or that the right to self-determination cannot be a constituent part of the European constitutional traditions: I say that the recognition of such a right does not depend only on the individual demand of a single nation while it has to be the result of a common elaboration of the community of all the European States, or of the majority of them. Only common elaboration can give evidence of the general acceptance of the mentioned right and of the values which are underpinning it and you know that the Croatian State had a difficult take-off on the Nineties of the past century.

The paper of prof. Jarasiunas mentions the Lithuanian Statutes adopted in the XVI century as an example of those “paradoxi-

cal subjects – unpredicted achievements” of the political – legal system which are characteristic of the Central and Eastern European region. The quotation deserves special attention because the preamble of the Lithuanian Constitution makes express reference to those Statutes which are defined by the *framers* as “legal foundations of the Lithuanian Nation”. Has this reference the same meaning of the quotations which are present in the preamble of the Croatian constitution or can we more easily connect them to the formation of the European constitutional heritage? As an external observer I cannot certainly pretend to assess the relevance of those documents for the historical constitutional identity of the Lithuanian Nation. This assessment is the task of other scholars who are well acquainted with the Lithuanian history and take part in this conference. To deal seriously with this question requires a full knowledge of all the passages which distinguish the Lithuanian constitutional development.

As a matter of fact the Lithuanian Statutes of 1529, 1566 and 1588 have a more general content than the documents quoted, for instance, in the Preamble of the Croatian Constitution. They are not dealing only with the claim of the Lithuanian Nation to its own identity and sovereignty. They include rules on the state, civil, criminal and procedural matters. Therefore they cover items which in more recent times have been interested by the principles on the protection of the human rights, which are constituent part of the European constitutional heritage. They have certainly a special relevance in the legal history of Lithuania. They entered in force in the frame of a country where the presence of the *ius commune* offered evidence of the in-

fluences of the Roman legal culture mediated through the establishment, on one side, of the University of Krakow and, on the other side, by the jurisprudence of the judges of Krakow and Vilnius. But if we look at the Statutes from the point of view of the European legal culture, we have to recognize that the legal historians, while they admit that the Statutes had a special importance as one of the first example, or the first example of a full written codification, share the opinion that their content is strictly linked with the social and political situation of the country in the XVI century. The codification of the old Lithuanian customs had been started by the Casimir's Code of the year 1468, the Statutes followed its path and tried, according to the opinions of some authors, to implement a design of balancing between the keeping of elements of the Roman law, which was seen by the gentry as a factor of centralization and of support of the King, and the guarantee of the special powers and privileges of the Lithuanian magnates. Therefore they appear as the result of the very peculiar Lithuanian developments which kept – many think – the country aside in respect of the evolution of the remaining Western part of Europe. Only with the adoption of the Constitution of 3 May 1791, in the last years of the State unity of Poland and Lithuania, the traditional cultural links of both these States with Europe found legal expression in presence of the new wave of the progresses of the Enlightenment.

The Lithuanian Constitution presently in force mentions in its Preamble both the Lithuanian Statutes of the XVI century and of the Constitutions of the Republic of Lith-

uania. I suppose that this last references regards both the Constitution of the year 1922 and the more recent of the year 1992. The Constitution of 1791 is not apparently mentioned. It pertains to a period of the history of this country when Lithuania was not an independent State and, therefore, there is no space for its quotations in a text which is aimed at justifying and confirming the right of Lithuania to its State identity. But if we take into consideration the concrete development of the history we cannot help remarking the fact that moving from the basis of the Lithuanian Statutes the Lithuania has entered in touch with the process of the development of the Western constitutional traditions. Afterwards with the advent of the European Union Lithuania has the way open to take part in the elaboration of the European law and it stays with its politicians, judges and scholars but also to all the Lithuanian citizens to offer the contribution of their historical traditions to the elaboration of the European constitutional heritage as far as they think that its concept as it is presently adopted by the European practice is incomplete and something which is now missing could be added by taking profit from the Lithuanian experience. The Constitutions (and even their preambles, as the French example teaches us) are written in such a way that they offer to all the interested people the basis for supporting the claim of their rights and interests and deriving from the relevant texts principles which can imply new safeguards and guarantees in view of the running of the time and the emergence of new exigencies of legal protection.

* I presented this paper at Vilnius on the anniversary of the Lithuanian Constitution.