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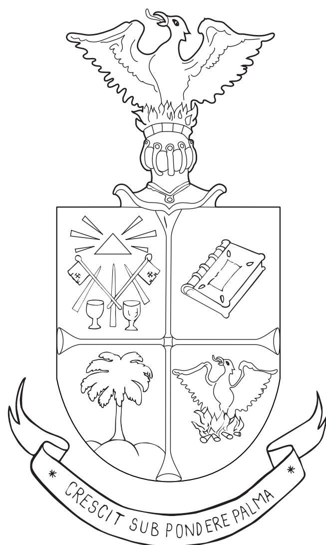

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The Role of the Constitutional Court in the Formulation of Criminal Law under Rule of Law

This study concentrates on the role played by the Constitutional Court in the formation of criminal law during the political transformation. According to the statement by Ferenc Nagy: "In the formation of criminal law complying with the statutory provisions of the Constitution and rule of law, the newly established Constitutional Court also actively participates beside the legislator..."[2]

Just as determining the composition of the Constitutional Court is today, so it was in the early days as well. „The Constitutional Court became one of the defining players in the constitutional transition".[3]

In the years after 1990, the establishment of a state governed by rule of law, as well as legal certainty and the protection of constitutional order, seemed to be the most important goals.

Tibor Király, a key figure in the study of criminal procedural law throughout this period and beyond, stated prior to the political transformation that punitive powers must never be unlimited.[4] The Constitutional Court in its decisions has seeking an answer to the question of where the boundaries should lie.

András Szabó, a former member of the Constitutional Court, wrote in 1989 that "...the law should stand on its own merits", - even without morality and without motivation. "This law, valid in and by itself, is able to promote general prevention with deterrence even when every other motivational factor fails". We should be unafraid of contributing a deterrent role to the law employing force because using force is no more unethical than violating the law.[5] The law anticipating and availing of the use of force is absolutely necessary, because when an infringement is committed, the noble motives

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2 Nagy Ferenc: *Tanulmányok a BTK Általános Részének kodifikációjához*. Budapest, HVG-Orac, 2005, 12.

3 Kukorelli István – Tóth Károly: *A rendszerváltozás államszervezeti kompromisszumai*. Lakitelek, Antológia Kiadó, 2016, 406.

4 Király Tibor: *A büntetőhatalom korlátai (1988)*. In: Király Tibor – Mezey Barna (szerk.): Szemelvények ötven év büntetőjogi és más tárgyú tanulmányaiból. Budapest, ELTE ÁJK Büntetőeljárási jogi és büntetésvégrehajtási jogi Tanszék, 2005, 203.

5 Szabó András: *A büntetőjog reformjáról és a reform büntetőjogáról*. In: Kriminológiai Közlemények, 26-27. Budapest, 1989, 44-94, 77.

that would prevent the use of force are missing. Retaliatory and deterrent criminal law is the *ultima ratio*, i.e. the ultimate solution applied as a last resort because every other dissuasive factor has failed. "Criminal law cannot be replaced with moral conviction, training in moral values, or a law-abiding culture, nor can it be an alternative to all the above. Criminal law does not redeem, instead; it retaliates..."[6]

In Decision 23/1990. (X.3.) AB András Szabó further specified in his parallel opinion that it is not the effectiveness of penalties that forms the basis of penalties, but the principle that "sin must not go unpunished and sin deserves punishment".

Criminal penalties should not necessarily be linked to accomplishing a goal or be suitable for the goal, since applying the penalties in spite of their not being effective or not reaching the objectives can be still necessary, right, and justified. The 'sin deserves punishment' principle can be realised even without accomplishing a goal, effectiveness, or fruitfulness. The societal purpose of criminal law is to be the keystone of sanctions for the law as a whole. Compared with the sanctions of other branches of law, András Szabó stated that criminal sentences have no reparative, restorative, or duty statuer role.[7]

According to him, the penalty for breaking the inviolable law has a symbolic function:

Violations of criminal law cannot go without punishment, even if we have a reason to do so, nor if the punishment doesn't achieve any objective, or if it is simply inadequate to meet a specified objective. The purpose of punishment lies in itself, in the public declaration of the inviolable law and in retaliation, disregarding any objectives. Punishment that disregards objectives is symbolic and retaliates against infringement of the inviolable law, which is synonymous with the principle of proportionate penalties. The principle of proportionality excludes purpose-oriented punishment, because what the latter requires and allows is not proportioning it to the gravity of the harm, but referring to the objective. For example, if we considered the purpose to be moral education or treatment, with respect to a serious criminal offence, the standard or the frame of reference would be education or curability and not the gravity of the infringement. However, the condition of the personality of an offender cannot form the basis of punishment under rule of law. The penalty for an infringement of inviolable law and the retaliatory and proportionate penalty is more humane than a purpose-oriented one. Although the latter seems to be humane and corrective in nature, the former does not affect one's personality, personal autonomy or freedom of conscience. The logic of imposing sentences in criminal law cannot be interchanged with the logic of education and cure if it is to remain within the judicial framework.

6 Ibid., 77.

7 It should be noted that, according to this concept, the ideal of restorative justice and reparation during the mediation procedure are considered as foreign matter in the system of criminal law and criminal justice.

He continues that it is retaliatory punishment that indeed has respect for the individual, since it does not step in the territory or role of a psychologist or social worker. As such, it is not binding for the offender to submit to such treatment as part of the punishment. These functions can only be offered as a service at the time of implementing the sentence.[8]

Criminal law forms the legal foundation of exercising punitive power – resolution 11/1992. (III.5.) AB

The AB decision declares that Hungary is a state governed by rule of law and at the same time it aims to achieve it as an objective. "Rule of law is realised when the Constitution is being taken into effect in deed and unconditionally. For law, the change of political transformation means, and legal transition is exclusively possible, in the sense that the whole legal system has to be harmonised with the Constitution of rule of law, as well as in view of the new legislative act, which must be held in unity". Resolution 11/1992. (III.5.) AB.

The same decision emphasises that the state must not have unlimited punitive power, as public authority itself is never unlimited, either. Public authorities may intervene in the basic freedoms and rights of an individual – "*lege ferenda*" – but only with constitutional authorisation and for constitutional reasons. The bans and directions of criminal law, in particular its punishments, all affect fundamental rights or legally protected rights and values.

Unavoidable, necessary, and proportionate statutory limitations are the basis and also the constitutional meaning of the explanation of the punishment meted out by criminal law (action in criminal matters), which is the last resort of all legal consequences, which states that it is the ultimate instrument among all possible legal consequences.

This AB decision also held that criminal law in the constitutional rule of law is not only instrumental, but it protects values, as it also has intrinsic values that are principles and guarantees of constitutional criminal law. Criminal law is the legal basis of exercising punitive powers and also serves as a „charter" for the protection of individual rights. Constitutional principles likewise become evident through the fact that both criminalisation and fixed penalties are regulated by law. Establishing criminalisation and threatening with punishment must have a firm rationale, predicated upon constitutional grounds, which implies that they must be necessary, proportionate, and applied as 'ultima ratio'.

Principles of the control exercised by the Constitutional Court – AB resolution 30/1992. (V.26.)

Resolutions more than once refer back to previous ones, indeed reformulating the same principles and concepts. In Decision 30/1992. (V.26.) AB, the applicability of criminal law as a last resort is again emphasised when it is stated that "criminal law

8 Szabó (1989) op. cit., 44-94, 77.

is the *ultima ratio* in the civil liability system". Its social purpose is to function as the keystone of sanctions for the whole legal system. The role and purpose of criminal sanctions, that is, punishment, is to maintain the integrity of legal and moral norms when the sanctions of other branches of law are proved to be helpful no longer.

Furthermore, the Constitutional Court also drew attention to the fact that giving effect to the punitive intention of a state is a constitutional duty. Under a democratic rule of law, the punitive power operates within the public authority of the state, which is constitutionally restricted to holding those committing crimes accountable.

Criminal offences violate the legal order of society and the right to impose penalties belongs to the state. The exclusive right to prosecute of crime also involves the duty to provide for the implementation of the punitive intention; therefore, at the same time, making offenders give account for their deeds based on criminal law is a constitutional duty of a state.

Exercising punitive powers will necessarily affect the constitutional and fundamental rights of individuals. The duties of the state derived from the Constitution justify the right of state bodies exercising powers to have effective means of performing their statutory tasks, even if these instruments seriously limit personal rights by nature.

The decision also discusses the issue of the enforceability of sentences. The Constitutional Court observed that implementing punitive power affects the individual in the most noticeable way in this stage of enforcing criminal responsibility. There is no doubt that the legal basis of interfering with core human rights is the final judgement that is reached in criminal proceedings. However, actual restriction and interference take place during the time of enforcing a conviction. Although the change is brought about legally in the condition of the individual's legal conviction, the genuine change is realised by enforcement.

The 30/1992. (V.26.) AB decision identified the criteria of the Constitutional Court's control. "It is a content requirement, arising from constitutional criminal law, that the law-giver may not act arbitrarily when defining the range of punishable conduct". The necessity for the criminalisation of a certain conduct must be judged by strict standards: "The legal set of instruments of criminal law, which necessarily restricts human rights and freedoms for the protection of different moral and legal norms and life conditions, should be only resorted to when it is certainly necessary to do so, and even then only in reasonable portion and when no other course of action is left to protect governmental, societal, and economic objectives and values, which are included in or traceable to the Constitution".

The Constitutional Court assigned itself the task, when evaluating the constitutionality of a provision of criminal law; to examine, whether the given provision of the Criminal Code "provides a temperate and appropriate answer to the phenomenon regarded as dangerous and undesirable conduct". In other words, does the Criminal Code strive to keep restricting basic constitutional rights to a strict minimum to achieve its objectives

in compliance with the applicable requirements? According to the requirements of constitutional criminal law, the provision describing a certain conduct that is prohibited with the anticipation of legal sanctions must be unambiguous, well-defined and clearly expressed. The clear expression of the legislative will regarding one's protected legal interest and the criminal conduct discussed is a constitutional requirement. "The message must be clearly articulated as to when an individual commits an offence sanctioned by criminal law. At the same time, it should restrict enforcers from giving potentially arbitrary interpretations to the law. Care must, therefore, be taken that the definition does not assign the range of punishable conducts too broadly and that it is distinct enough". (ABH 1992, 176.)

The vocabulary of the Constitutional Court (and of the works of András Szabó) include the term „constitutional criminal law", which ignited controversy among professionals. Imre A. Wiener considered the term „constitutional" as nothing more than the replacement of the former term „socialist". He holds that, since this new attribute was only necessary when criminal law was identical to the legal rules, today using any kind of branding is unjustified. [9] Imre A. Wiener explains: "For thousands of years, the concepts of law and rights have independently existed in all languages. According to the rules of formal logic, A cannot be equal to B. Therefore, identifying rights with the law disregards the rule of formal logic. The term "constitutional" can be attached to the law and it can be stated thusly – that we distinguish constitutional law from unconstitutional law. However, unconstitutional criminal law cannot exist with the correct conceptualisation of the terms".[10]

Ferenc Nagy does not consider using the term „constitutional" necessary either since, in the domain of criminal law, basic human rights and legal principles are enshrined in the Constitution and present an inviolable barrier.[11] "Criminal law, however, is not merely applied constitutional law, but it is an autonomous field of law with its own system of sanctioning and responsibilities that can also be construed as the actual limitation of the fundamental rights incorporated in the Constitution".

Under constitutional rule, a state does not allow execution by hanging (András Szabó) 23/1990. (X.31.) AB decision regarding the unconstitutionality of capital punishment.

The Constitutional Court declared, *inter alia*, the unconstitutionality of capital punishment, otherwise known as the death penalty, and negated the provisions applicable to it. It stated that the death penalty does not only limit the essential content of the fundamental rights of all human beings to dignity and life, but also allows the complete and irreparable annulment of life and human dignity, and also negates the rights ensuring these.

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9 Wiener A. Imre: *Büntetőpolitika-büntetőjog*. In: Wiener A. Imre (szerk.): Büntetendőség-büntethetőség. Budapest, KJK-KERSZÖV., 2000, 31.

10 Ibid., 31.

11 Nagy Ferenc*: A magyar büntetőjog általános része*. Budapest, Korona, 2004, 37-38.

The Constitutional Court also found that the provision introduced by amendments to the second paragraph of Article 8 of the Constitution on 19 June 1990 is inconsistent with the cited text of the first paragraph of its Article 54. It is incumbent upon the Parliament to achieve consistency.

Human life and its inherent dignity are an inseparable unit and represent the highest value, above all else. Similarly, the right to human life and its inherent dignity is also an indivisible and unrestrained fundamental right as one unit, which is the source and prerequisite of a number of other basic rights. The right to human life and dignity as absolute values is a constraint on the punitive authority of the state.

The first paragraph of Article 6 of the International Covenant on Civil and Political Rights – to which Hungary is also a party and which was proclaimed by Law-decree No.8 of 1976 – agrees upon the following principle: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

Should justice be achieved? The justice of punitive law during the political transition

One of the significant questions raised by the political transformation was whether justice should be done. The Parliament passed a bill on 4 November 1991 that answered this question: "Could capital offences committed between 21 December 1944 and 2 May 1990 and not prosecuted for political reasons now be brought to justice"? The Constitutional Court ruled that this law was unconstitutional and declared legal certainty to be a primary value. A constitutional state under the rule of law may only respond to infringements in accordance with it. Guarantees of the rule of law are applicable to all. Laws must be clear, comprehensible and predictable. Provided that these principles are observed, the prohibition of the retroactivity of the law, and the ban of regularising *ex post facto* shall prevail.

AB decision 9/1992 (I.30) stresses again that legal certainty is an indispensable element of rule of law. Legal certainty makes it mandatory for the state, and first of all for the legislator to ensure that the law as a whole, as well as its various subfields and the particular legal rules, are also documented in a clear and comprehensible way for those concerned. In respect of their operation, they must be predictable and foreseeable. Hence, legal certainty does not only require the clarity of particular norms, but also the predictability of the operation of each legal institution. This is why procedural guarantees are fundamental in terms of legal certainty. Valid statutory rules can only be created by following the rules of formalised procedures and legal institutions can only operate constitutionally by observing the procedural rules. The requirement of rule of law regarding substantive justice can be met by remaining within the boundaries of institutions and guarantees providing legal certainty. In other words, legal certainty as the guarantee is the priority, and justice can only be examined only in relation to it.

The Constitution cannot ensure a legal right to the "enforcement of substantive

justice", just as it cannot ensure that no criminal sentences will be unlawful, as indicated in the decision. The above are the objectives and responsibilities of rule of law, which it can fulfil by establishing the appropriate institutions – ones that, first of all, provide procedural guarantees - and also assure the respective individual rights. The Constitution therefore provides rights for those procedures that are necessary and, in most cases, appropriate for enforcing substantive justice.

The Constitutional Court expressed its view in several decisions concerning the constitutional aspects of the criminalisation of specific conducts and concerning the fact that, when assessing the constitutionality of a given regulation of criminal law, it is necessary to examine whether the specific ruling provides a "moderate and appropriate response for the phenomenon considered dangerous and undesirable". In other words, whether criminal law is confined to the narrowest possible circle in trying to reach its objectives in accordance with the authoritative requirements in the event of limiting constitutional basic rights.

Legal certainty is primary - 11/1992.(III.5.) AB decision

The Constitutional Court emphasised the primacy of legal certainty in this decision. Therefore, it believes, for example, that the unjust result of legal relationships in itself is not a valid argument against legal certainty. We can also put it in this way: legal certainty is more important than truth.

In another place in the decision, the wording specifies: "By having the foundation of a value system of the rule of law while avoiding the guarantees of rule of law, even legitimate claims cannot be validated". Regarding the Law of Lustration, the decision emphasised that while the given historical situation can be taken into consideration, putting aside the foundational guarantees of rule of law using the excuse of the historical context and referring to justice required by rule of law is unacceptable.

The rule of law cannot be practiced if it is in conflict with rule of law. Objective legal certainty, which rests on formal principles, is superior to always partial and subjective justice. The Constitutional Court cannot disregard history, since its mission is also historical in nature. Moreover, the Constitutional Court is the trustee of the paradox of "revolution through the rule of law", and therefore it is essential for the Constitutional Court, within its own scope of authority, to ensure the harmony of legislation with the Constitution during the peaceful political transformation, which started with the Constitution of rule of law and is played out in the implementation of this Constitution.

According to the Constitutional Court's view, a constitutional rule of law may only respond to an infringement of rights in accordance with rule of law. The legal order of rule of law cannot withhold the guarantees of rule of law from anyone, since such rights must be conferred upon every individual as basic rights. Based on the value system of rule of law, even legitimate demands cannot be validated if that would require ignoring the guarantees of rule of law. While justice and moral justification

may be motivation for penalisation and the need for justice to be served, legal grounds for punishment must however be constitutional.

According to the AB Decision, the Law of Lustration raises a particularly sharp focus on the relationship between the law of former systems and rule of law based on the newly established Constitution. With the constitutional amendment declared on 23 October 1989, in essence, the new Constitution entered into force, and it introduced a radically different and new standard compared to the one previously followed for the state, the laws and the political system with the definition: "The Republic of Hungary is an independent and democratic rule of law" - states the decision. This is the meaning of the political category of "regime change" in constitutional terms. Therefore, the evaluation of the state measures required by the political transformation cannot be separated from the requirements of rule of law, which became crystallised in constitutional democracies throughout history and also served as a foundation during the constitutional revision of 1989.

The Constitution determines the fundamental institutions of the structure of the state under rule of law, as well as their main operating rules, and also includes human and civil rights with their essential guarantees.

Rule of law is realised when the Constitution is taken into effect in reality and unconditionally. As previously stated, for law, political transformation means that legal transition is exclusively possible in the sense that the whole legal system has to be harmonised with the Constitution of rule of law, as well as held in unity in view of the new legislative act. It is not only the legal rules and the operation of public authorities that must be in strict accordance with the Constitution, but the conceptual culture and value system of the Constitution should also pervade the whole of society. This is rule of law; this makes the Constitution a reality. The realisation of rule of law is a process. It is the constitutional obligation of public authorities to labour for its fulfilment. The political transformation happened on the basis of legality.

The principle of legality imposes the requirement on rule of law that the rules of the legal system concerning itself must be taken into effect unconditionally. The Constitution and the cardinal laws, which introduced revolutionary changes from a political viewpoint, were created in compliance with the legislative rules of the former legal order and derived their binding strength from there; as for their formulation, they are beyond reproach. The former legal order remained in force. In terms of validity, there is no difference between "pre-constitutional law" and the "post-constitutional law". The legitimacy of the various systems of the past half-century is neutral in this respect. It does not have to be interpreted as a separate category in terms of the constitutionality of the legal rules. All existing legislation, irrespective of when it was created, must be consistent with the Constitution. In assessing whether a rule is consistent with the Constitution, there are no two layers of legality, just as there are not two types of standards either. The time of origin of certain pieces of legislation can only have significance in the sense that once the newly established Constitution

entered into force, the former rules could have become unconstitutional.

The special handling of the law of previous systems, even while acknowledging legal continuity and legality, can be relevant with regard to two aspects. The first question is what can be done with those legal relations that had been created on the basis of old regulations, which have become unconstitutional over time and can they be brought into conformity with the Constitution? The second question is when judging the constitutionality of new regulations applicable to the now unconstitutional provisions of former systems, can the specific historical situation of the political transformation be taken into consideration? These questions must also be answered in compliance with the requirements of rule of law.

Csaba Varga very sharply criticised the decision made by the Constitutional Court concerning ministering justice.[12] In his view, the Constitutional Court shattered the underlying issue with its dismissive formal decision, instead of contributing to solving the problem.

"One of the distinguishing features of these decisions and similarly made decisions, which practically eliminate the chances of a meaningful political transformation, was that while squeezing itself into the lofty cloak of rule of law with some formal references, it was not even willing to face the underlying societal problem as a problem, something to be resolved". He described the Hungarian decision as a failure of our entire legal culture, in comparison with the Czech and German solutions.

Wiener also levelled criticism against the approach of the Constitutional Court: "It seems that the Constitutional Court interprets justice with reference to the application of the law, rather than to the creation of law, and justice has been pushed into the background in favour of legal certainty according to the interpretation of Constitutional Court".[13] According to Wiener, legal certainty and objective justice must be evaluated separately for the sake of clarity of the concepts, since punitive criminal law can satisfy the requirements of legal certainty, even if it violates objective justice in the meantime.

According to the thoughts of Ákos Pauler from over a hundred years ago, we may only speak about rule of law when law honours human rights. In his work, written in 1907, he stated that law was deficient in creating ideals. He extended his criticism to the regulations of criminal law too. His thesis is the following: "Law is only appropriate when it sees its own sanction as honouring the human individual".[14] Pauler defines fair law as the ideal law. „The state, therefore, while guiding its citizens towards the realisation of true culture, will also be seen as a rule of law since it also intends to possibly comply with the requirements of law".

12 Varga Csaba: *Teória s gyakorlatiasság a jogban: A jogtechnika varázsszerepe*. In: Gál István László – Kőhalmi László (szerk.): Emlékkönyv Losonczy István professzor halálának 25. évfordulójára. Pécs, 2005, 317.

13 Wiener (2000) op. cit., 31.

14 Pauler Ákos: *Az ethikai megismerés természete*. Budapest, Franklin-Társulat, 1907, 228.

According to Wiener, rule of law is a concept of legal philosophy, of which objective justice and legal certainty are also elements.[15] In Ligeti's wording, after the collapse of the former communist systems, it again became timely and relevant to demonstrate the boundaries of criminal law under rule of law and the relationship between criminal law and the Criminal Code.[16]

To show how much the former communist countries shared the same background, he used a very relevant quotation: "We expected justice, but received rule of law instead".[17] These were the words of the former East German Rüthers. Ligeti equally considers both the formal and the material concepts as constituent ingredients of rule of law: "A state is considered to be a rule of law only when it enables the manifestations of state power to be measurable by laws and is built upon the concept of justice".[18]

Ferenc Nagy also sees potential threats in the new system: "Other kinds of consequences are also noticeable in 'transitioning' to the criminal law that functions under rule of law; namely that the classical principles and rules of criminal law are being continually and gradually eroded..." „It may be slapping rule of law in the face that criminal law often becomes the instrument of political power, again alongside the pragmatics of criminal policy and hiding under its disguise".[19]

I myself hold the requirements of criminal law under rule of law and of constitutional requirements of the criminal law as normative. I greatly appreciate the role of the Constitutional Court in this; namely the doctrinal statement according to which the legal order of rule of law cannot withhold the guarantees of rule of law from anyone, since such rights must be conferred upon every individual as basic rights. Based on the value system of rule of law, even legitimate demands cannot be validated if the validation would require putting aside the guarantees of rule of law.

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15 Wiener A. Imre: *Büntetőjogunk az ezredfordulón*. In: Acta Facultatis Politico-iuridicae Universitatis Budapestiensis XL, 2003, 7-54.

16 Ligeti Katalin: *A jogállami büntetőjogról*. In: Wiener A. Imre (szerk.): Büntetendőség-büntethetőség. Budapest, KJK-KERSZÖV., 2000, 84.

17 Ibid., 88.

18 Ibid., 88.

19 Nagy (2005) op. cit., 12.