Protection of the Constitutional Order after World War I

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Introduction

The World War I radically changed the world, especially Europe, in almost every sphere of social life. The World War I brought about essential changes also to the existing political system. As a result of the World War I, a new political map of Europe emerged: the German, the Austro-Hungarian, the Russian, and the Ottoman Empires collapsed, several new countries gained independence, as the national states in the Central and Eastern Europe proclaimed their independence on the ruins of the former empires. The creation of new states and their constitutional consolidation, as well as the transformation of the fallen empires into national states caused essential changes in the theory of constitutional law.[1] The main role in reforming the constitutional law in the Central and Eastern European Region was definitely played by Germany. Its Constitution of 11 August 1919[2] (hereinafter—the Weimar Constitution) was considered to be the most advanced Constitution in Europe and "the last word on constitutional legislation".[3] The victory of Great Britain and France in the World War I furthered the faith of the new states in the advantages of parliamentarianism and its adequacy for the needs of a modern society.[4] The acceptance of the principle of popular sovereignty formed the basis for taking over institutions of direct democracy from the constitutional regulatory framework of the Swiss Confederation.[5]

The objective of this article is to analyse the protection mechanisms of the constitutional order after the World War I within the context of comparative law. In order to reach the objective of this article, the author will analyse the doctrine of constitutional law after the World War I, by characterising the attitude of that time to the protection of the constitutional order. Within the framework of this analysis, the legislative and institutional protection mechanisms of the constitutional order in the constitutions which were adopted after the World War I will be discussed.

1. Legislative Protection of the Constitutional Order

After the World War I, the constitutional legislators tried to ensure the stability and immutability of the constitutions adopted after the World War I by introducing a qualified majority voting procedure for making amendments to the constitutional

provisions.[6] It was included into the texts of constitutions in order to protect the constitutional order. The majority of votes in the Parliament were requested for amending the Constitution, often envisaging the rights of other state authorities to hold a democratic referendum on constitutional amendments or even approve the amendments by a referendum.

Constitutional amendments could be passed by the constitutional majority of the Parliament. Thus, for example, the first paragraph of Article 103 of the Constitution of the Republic of Lithuania of 1 August 1922 envisages that the Seimas can amend any constitutional provision by a majority of three fifths of the Seimas' component members.[7] Whereas, Article 76 of the Constitution of the Republic of Latvia of 15 February 1922 stipulates that the Constitution can be amended at the sittings of the Saeima at which at least two thirds of the Saeima's component members participate. The amendments are adopted in three readings by a majority of two thirds of the members present.[8]

If the national Constitution envisaged a bicameral parliamentary system, both parliamentary chambers usually were involved in the constitutional legislative process. Thus, for example, the first paragraph of Article 125 of the Constitution of the Republic of Poland of 17 March 1921 granted the right to amend the Constitution to the Sejm and to the members of the Senate. The Constitution could be amended if at least half of the Sejm or the Senate members participated in the respective sitting and at least two thirds of the members of the respective chamber present voted for the amendments.[9] Article 76 of the Weimar Constitution envisaged the cooperation of the Reichstag and the Reichsrat in amending the Constitution.[10]

The constitutions of some countries envisaged the possibility to hold a referendum on amending the Constitution if any state institution called for it. Thus, for example, the second paragraph of Article 103 of the Constitution of the Republic of Lithuania of 1 August 1922 granted the President of the Republic or one fourth of the members of the Seimas or 50,000 citizens the right to request a referendum on the amendments to the Constitution adopted by the Seimas.[11] Article 76 of the Weimar Constitution envisaged the right of the President of the Reich, at the request of the Reichsrat, to announce a referendum on the adopted amendments to the Constitution.[12]

Some countries envisaged a mandatory referendum on amending the Constitution or some of its provisions. Article 88 of the Constitution of the Republic of Estonia of 15 June 1920 envisaged a referendum on any amendments to the Constitution.[13] Article 77 of the Constitution of the Republic of Latvia of 15 February 1922 envisages a referendum on the amendments to the fundamental principles of the constitutional order (independence of the country, sovereignty of the people, a democratic republic, universal suffrage), if at least half of the Latvian citizens vote for them.[14] And the second paragraph of Article 44 of the Constitution of the Republic of Austria of 1 October 1920 stipulated that a complete review of the Constitution should be approved by a referendum.[15]

At the same time, constitutions could be amended completely, namely, no issues were envisaged on which it would be impossible to decide by amending the Constitution. It was deemed that by amending the Constitution it was possible to review any framework decision, including the abolition of the democratic regime or giving up state's independence.[16] According to this view, the expression of the incontestable will of the majority of the people stipulated by the Constitution could not be legally qualified as a *coup d'etat* or insurgency even if all the fundamental principles of the

Constitution were revised.[17] The Constitutional Court of Latvia has also acknowledged that the Constituent Assembly of Latvia had not defined the fundamental principles of the Constitution of Latvia as unchangeable forever.[18] According to the Constitutional Court, Article 77 of the Constitution guarantees the exclusive rights of the Latvian people to deal with the fundamental provisions of the Constitution as they wished, namely, to repeal the Constitution, to establish a new constitutional order or to revoke Latvia's statehood.[19]

Though formally the provisions which envisaged amendments to the Constitution were included in constitutions, most often it was done to protect the existing text of the Constitution instead of stimulating the legislator to carry out a fundamental constitutional reform. At the Constituent Assembly of Latvia one of its members expressed a view that the Constitution would determine the constitutional order for generations to come.[20] Similarly, no restrictions on amending the Constitution were included in the Constitution of Czechoslovakia of 1920.[21] Nevertheless, its commentators remarked that the authors of the Constitution had obviously no doubts about the immutability of the political regime and the economic system embodied in the Constitution.[22]

The constitutions which seemed amendable were actually based on the confidence in their sustainability, namely, their authors hoped to achieve unanimity—with the help of the Constitution—among certain political forces and society in the stability of the constitutional order which would guarantee its eternal existence. Most of these constitutions were drafted by authors who were confident that the democratic system was the best possible model of constitutional order and that the people would never wish to have a different system.

After the World War I, a period of constitutional romanticism set in. "Constitutional romanticism manifested itself in widespread longing for constitutional order and the rosy hopes connected with this order implied that by establishing a Constitution and the participation of the representatives elected by the people in the legislative process would certainly ensure the best laws in the future which would be followed by freedom and universal well-being as a result of enforcing these laws."[23] Such disposition excluded the view that a democratic republic could be abolished or that the people could support political forces which would favour the transformation of the constitutional order. That is why the idea was accepted that the protection of the fundamental principles of the Constitution could be entrusted to the people who could demand a referendum on the fundamental issues of transforming the constitutional order.[24]

The experience of European constitutionalism shows that the opponents of democracy used the democratic procedures in order to repeal the constitutional order in a legal way. The new constitutional order which had emerged after the World War I collapsed in a short time as a result of fighting against the internal and external enemies of the democratic system. It facilitated the establishment of authoritarian regimes and demonstrated that the values of a state governed by the rule of law could never be completely safe. These values have to be fought for incessantly not only in the new democracies but also in countries having long-standing and stable democratic traditions. If dismantling democracy is possible in Kant, Beethoven and Goethe's Germany, it is possible anywhere.[25] The democratic system should be able to protect itself, namely, it should not stay neutral and tolerant toward political forces who take advantage of democratic procedures in order to abolish democracy.[26]

2. Institutional Protection of the Constitutional Order

After the World War I, it was universally acknowledged that the Constitution was the highest legal norm of positive legal norms, namely, it was a legislative act having the highest legal force.[27] This standpoint was reflected in the constitutions drafted at that time. It was declared in Article 3 of the Constitution of the Republic of Lithuania of 1 August 1922 that laws which did not comply with the Constitution were invalid.[28] Article 3 of the Constitution of the Republic of Estonia of 15 June 1920 envisaged issuing laws in compliance with the Constitution and Article 86 defined the Constitution as a set of unalterable norms governing the activities of public authorities.[29]

However, the constitutions drafted after the World War I most often did not include institutional mechanisms for the protection of the Constitution. Therefore, in reality the guarantees for the supremacy of the Constitution were often not implemented. Thus, for example, the Lithuanian legal scholars considered Article 3 of the Constitution a purely declarative democratic abstraction as it did not envisage any control procedures of its constitutionality. A view was even expressed that ensuring the constitutionality was only a moral and political duty of the members of the Seimas which they took upon themselves swearing the oath of a member of the Seimas.[30]

However, in some countries one of the most significant institutional protection mechanisms of the constitutional order—the Constitutional Court—was established. The idea of establishing and consolidating the Constitutional Court belonged to Hans Kelsen.

Hans Kelsen held the view that application of constitutional provisions in drafting laws and regulations would be effective only if some public authority was allocated the jurisdiction to examine the compatibility of legislation with the Constitution and, if necessary, abolish the respective laws. The body exercising these rights had to be independent of the Parliament, namely, the abolishment of anti-constitutional laws could be entrusted to a public authority which was independent of any other authority exercising public powers. Such authorities could be either courts which would not apply norms inconsistent with the Constitution in adjudicating concrete cases or a special public authority—the Constitutional Tribunal, which evaluates the conformity of laws to the Constitution by applying a special procedure.[31]

Hans Kelsen's idea of the necessity of a Constitutional Court was implemented in the constitutions of two countries. Constitutional guarantees were introduced in the Constitution of the Republic of Austria of 1 October 1920. Article 137 of the Constitution stipulated the establishment of a separate Constitutional Court.[32] Likewise, Article 2 of the Law on Entry into Force of the Constitution of Czechoslovakia of 29 February 1920 envisaged the establishment of a Constitutional Court whose duty would be to examine the compatibility of legislation with the Constitution.[33]

After the World War I, the view that the basis for the protection of the Constitution was the right of the courts to examine the constitutionality of legislation gained popularity in the theory of constitutional law.[34] Evaluation of the constitutionality of legal provisions was considered not only the right but also the duty of judges which could be implemented when adjudicating concrete cases by a court of any instance. Abstention from applying anti-constitutional laws in concrete cases helped to decrease political crises, avert the arbitrariness of Parliament members and strengthen the rule of law. That is why the right to decide issues of constitutional law complies with the concept of separation of powers and independence of justice.[35] The state represented by a random parliamentary majority cannot be

granted unlimited rights of legislation and therefore the judges must evaluate the compliance of legislation with the Constitution. Judicial control is the most powerful weapon against the arbitrary actions of the parliamentary majority.[36]

Scientific discussions have been held in Latvia about the rights of the judiciary to examine the compliance of laws adopted by the Parliament with the Constitution. The examination of the constitutionality of legislation seemed rather questionable to Kārlis Dišlers, "It is difficult to judge the expediency of this institution. The idea to guarantee lawfulness seems noble but if judicial authorities do not withstand external pressure they can be subjective in interpreting the Constitution."[37] And Roberts Akmentiņš frankly admitted, "A major flaw in our Constitution is the fact that we have not envisaged examining the compliance of our legislation with the Constitution. [...] In our circumstances, this flaw has more negative consequences than in the countries with a bicameral system and it may result in laws contradicting the Constitution."[38] Kārlis Ducmanis in his turn looked at the court's powers to examine the compliance of legislation with the Constitution in different countries as an effective mechanism for curbing parliamentary absolutism.[39]

On the whole, at that time it was considered in Latvia that the court had no right to check whether a law complied with the general principles of the Constitution.[40] However, the theory of constitutional law contained the following principle: if it has been clearly stated in the Constitution that a judge has not been deprived of the rights to examine the compliance of legislation with the Constitution or these rights have been assigned to another public authority, the judicial office and the responsibilities thereof oblige the judge to examine the constitutionality of laws.[41] The practice of the Senate of Latvia in the inter-war period attests the truth of this statement as the Senate practically interpreted the constitutional provisions and had reserved the right to decide on the conformity of laws and regulations with the provisions of the Constitution. Several rulings of the Senate of Latvia demonstrate that it had checked whether it was within the powers of the Cabinet of Ministers[42] to issue provisional orders in the Law of 16 July 1919 on the right of the Cabinet of Ministers to issue temporary provisions.[43]

The opponent of Hans Kelsen, Carl Schmitt expressed the view that courts were suited neither for controlling the legislators nor for ultimate interpretation of the Constitution. He considered that in the field of constitutional law political issues could not be separated from legal issues and therefore the court deciding on legal issues would resolve political issues at the same time.[44] Constitutional jurisdiction is political jurisdiction and, by deciding on constitutional law, an independent judge will interfere in political processes, becoming a participant of political debate. The courts applying the law in civil and criminal matters are oriented towards the past instead of being oriented towards the future and, in accordance with legal provisions, they are trying to assess events which have already occurred. However, in interpreting the Constitution, general political objectives and the interests of the state must be taken into account. The interpretation and protection of the Constitution must be within the remit of a political body instead of that of a judicial authority.[45]

According to Carl Schmitt, the President of the Reich performs the function of the guardian of the Constitution, as the President having a political office will be able to fulfil it more effectively than any court.[46] The function of the guardian of the Constitution is not limited to the protection of the Constitution; it implies also protection of the political unity of the state. For this reason, it can be ensured only by the President as a neutral arbitrator. The functions of the President as the guardian of the Constitution included not only the assessment of correct application

and control of parliamentary activities but also the competence to act in emergency situations in order to protect the state system and the Constitution. Carl Schmitt derived all functions of the President of Germany necessary for ensuring the functioning of the Weimar Republic, mentioned in the Weimar Constitution, from the status of the guardian of the Constitution.[47]

Carl Schmitt's conception offered an original and effective alternative to the Constitutional Court in the form of an institutional protection mechanism of the Constitution. It was based to a great extent on the theories elaborated by Benjamin Constant on the counterbalancing (neutral) power (*pouvoir neutre*) of a constitutional monarch.[48] However, Paul von Hindenburg's role as President of the Reich in the collapse of the Weimar Republic revealed the weak points of the conception of the President as the guardian of the Constitution.[49] It helped to discard all doubts about the Constitutional Court as the most important institutional protection mechanism of the constitutional order. Carl Schmitt's conception affected also some other countries. Thus, for example, discussions have been held in Latvia about according the status of the guardian of the Constitution to the President.[50] First of all, suspensive veto powers granted to the President mean his or her right to control the activities of the Parliament since the President, by exercising the veto powers, can control the compliance of the laws adopted by the Parliament with the Constitution. There has been also debate in constitutional practice regarding the new President's competences derived from the status as the guardian of the Constitution.[51]

Summary

The constitutions adopted after the World War I embody constitutional romanticism—the inclusion of the principles of people's sovereignty and parliamentarianism in the theory of national constitutional law—created a conviction that special protection mechanisms of the constitutional order were superfluous. It was taken for granted that by participating in elections and referendums the people themselves could protect their sovereignty and the constitutional order.

The provisions governing the procedure for amending the Constitution turned into the most important mechanism for the protection of the Constitution. The constitutional legislators tried to safeguard the stability and immutability of the Constitution with the help of amending the Constitution by the qualified majority voting procedure. At the same time, the relevant procedures gave the possibility for a complete revision of the Constitution, including the possibility to revoke the independence of the state or destroy democracy with the help of constitutional amendments.

After the World War I, Hans Kelsen's ideas of the necessity for a separate Constitutional Court were implemented. Austria and Czechoslovakia were the first countries in the world to establish the new public authorities—Constitutional Courts—whose obligation was to protect the constitutional order and control of the compliance of legislation with the Constitution. The idea of the need for constitutional control was discussed also in other countries strengthening the conviction that the judiciary in a democratic country could and had the responsibility to examine the compliance of the applicable law with the Constitution.

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