THE GOLDEN CALF OF CONSTITUTIONALITY

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Rationalism, modernism and a plenty of other –isms were only a reaction to the system of traditional society. The main paradigm of such a society was based on religion which was manifested in law as well. Organization of society, public authority, state and law were based on religious authority. The mankind was created by God, and the holders of power existed by the grace of God. The acceptance of royal power by the first Jewish king Saul served as a model. Saul was anointed by the prophet Samuel by the order of God.[1] The position of the holder of power was derived from God who also put the rules including the moral principles which the holder of power had to follow.

The modernists refused to view God as a base of law. The absence of this quality is most obvious in the constitutional law. Other branches of law see its basis and support in the norms of constitutional law with a higher legal force. The constitution, deprived of the basis in God, exists in itself – solitary, without support and, therefore, unstable. To make the constitution more solid, some people suggest replacing the nothingness which was created after depriving the constitution of God. These people want to be sure about something superior as well. They want the constitution to be religiously neutral but not value-neutral. They want to have some superior (transcendental) basis, but not the religious basis.

After rejecting the divine basis, the modern constitutions derived their dominant position in law and their higher legal force from the procedure of enacting which is more difficult for constitutional statutes than for ordinary statutes. This reason has its own logic. Nevertheless, some people are not satisfied with that. As a reaction to the fact that the democratic constitutions enabled the non-democratic regimes to take up the power, the so-called clauses of inflexibility started to appear in the constitutions. The legal theory created the

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[1] A day before Saul came, Jehovah revealed to his ear: „Tomorrow at this time I am going to send you a man from the Benjamin country. You will anoint him as a duke of my Israeli nation, he will save my nation from the power of the Philistines. I looked down on my nation whose calls came to me. 1st Samuel book (1S), chapter 9, verse 15-16, likewise 1S 10, 18-24.

concept of the material gist of constitution which has a higher rank than other parts of constitution.[2] However, the inflexibility is congruent with eternity and the material gist - with transcendence.

The clause of inflexibility

Some constitutions except the constitutional change of some institutions (clause of inflexibility or eternity). However, this clause is likely to be reviewed as declaratory in the course of centuries or millenniums. The inflexibility can exist only where the social development stops. We judge others beyond their epoch and with the course of time but we miss such a course of time when we judge this epoch. In the 1st century, most ancient politicians considered the Roman Empire with the Roman peace to be the point of culmination in the history of mankind. However, the Christianity did not accept such a point of culmination and had a different vision of the social development. But after all we can learn from the recent historical periods. Is the clause of inflexibility not similar to the ideas of the chiliad 3rd German Empire or to "With the Soviet Union for eternity and never otherwise."? The history shows that the society which declares itself to be the top of the history is at the beginning of its own decline.

The idea of the end of the history contented the medieval chiliad visions of the end of the world or the theory of the end of the world by the victory of communism (Marx, Engels, Lenin)[3] or by capitalism and liberal democracy (Fukuyama).[4] The supporters of the victory of communism and of capitalism

[2] PAVEL HOLLÄNDER: Materiální ohnisko ústavy a diskrece ústavodárce, *Právník* 4/2005, p. 313-335, ISSN 0231-6625. CARL SCHMITT: Verfassungslehre, 8. edition Berlin 1993, p. 103-105, 109-110, ISBN 3-428-07603-6

[3] The essence of the Marxist philosophy of history consisted in a special type of fabricating process which was based on the relation between the productive forces (productive instruments and human labor) and the production relations. Their conflict was the driving engine of the history when the still-developing productive forces get into conflict with the existing production relations, which causes revolution, and the old production relations are replaced with the new production relations within the new ruling class over the private ownership of the productive instruments (production tools and natural resources). The last revolutionary class is the proletariat which will dispose of the private ownership, the state will die and the classless society will be created in the last revolution – communism as the top of the human history. BEDŘICH ENGELS: *Původ rodiny, soukromého vlastnictví a státu*, Praha 1967, p. 110-120. VLADIMÍR ILÍČ LENIN: *Stát a revoluce*, Praha 1967, 15-19.

[4] Fukuyama, together with Hegel and Alexander Kojév, considers the drive for recognition to be the driving motor of the history. The drive for recognition is fulfilled with the victory of the liberal democracy which eliminates the difference between lords and servants. At this moment, the general recognition of everyone is gained and the end of history comes. It is not the end of historical events but it shows the final and supreme social order in capitalism and liberal democracy where no essential conflicts in fulfilling the needs of recognition exist and the life is satisfying (there are no sources of deeper dissatisfaction). A **universal state** will be created which will guarantee recognition to everyone, and a **homogeneous state** when the classless society will be created by the disposal of the differences between the lords and servants and the lord's freedom and servant's labor will be available for everyone. The liberal democracy is not the most just thinkable regime but in reality it

drew the theses of the end of the world from the philosophy of Georg Wilhelm Hegel who considered the drive for appreciation to be the moving force of history. The end of history cannot come, if the mankind lives.

Hayek warned of implementing the ideological concepts to the legal regulations. Hayek identified as *moral states in a negative sense* those states which bring the ideas of moral problems into the law and impose such ideas on all the people (Nazism and communism). Contrary is the liberal state which is not unmoral and does not impose its ideas of moral problem on all its citizens - its law is created by the system of noted rules where the foreseeability of the consequences is the main priority for the free choice of the people's behavior.[5] From this point of view, the theory of the material gist seems only to be an endeavor of the constitutional court (which uses this theory as a reasoning for the usurpation of power to repeal the constitutional statute[6]) to regulate particular subjective moral opinions of law in the legal system beyond the traditional enacting mechanism by the constitutional body and by the legislative body in the European continental system. Here, it is possible to remind of Hayek's warning of the arbitrariness of the public authorities: *"Broader and broader competences are being conferred to new authorities who without being bound by firm rules have almost unlimited arbitrariness ..."*[7]

France has a regulation which prohibits change of the republican form of state.[8] Nevertheless, France changed its form of government in the last two and

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is the most just regime. Fukuyama downplays his words with an allegation at the end: "... *we cannot be sure if the passengers do not find the new milieu unsatisfactory and do not set up on next journey."* (p. 318)
Francis Fukuyama insists on his thesis of the top of the history in the liberal democracy and capitalism: The west has won, The Guardian 11, October 2001, http://www.guardian.co.uk/world/2001/oct/11/afghanistan.terrorism30 even after the attack on the World Trade Center in New York on 11. September 2001 when he stated that the terrorist attacks cannot create a general accepted alternative to capitalism and liberal democracy. These Fukuyamas' words are remarkable: *"... on the international stage no ideologies will compete – the majority of economic developed states will be established according to similar principles* (capitalism – note by ZK*) – but cultures*" which brings him near to the theory of the battle of civilizations by Samuel Huntington who does not agree with the end of history (p.228), Fukuyama accepts that "... *liberal democracies are not self-sufficient: the life of the society on that they are dependent have to appear from another source than from liberalism itself*." (p. 308) and that also in democracy originates: *"...dissatisfaction with the freedom and equality. From this reason those who stay discontent will always be able to start new history*." (p. 314).
FRANCIS FUKUYAMA: *Konec dějin a poslední člověk*, Praha 2002, p. 9, 11, 12, 17, 53, 61-67, 145, 150-153, 173, 178-179, 181-182, 193-195, 199, chapter 19 Univerzální a homogenní stát, **200,** 202, 204, 228, 276, 285, 286, 295, 308, 317-318, ISBN 80-86182-27-4.

[5] FRIEDRICH AUGUST von HAYEK: *The Road to Serfdom*, Phoenix Books, 1944, p. 80-82. Similarly, Hayek points out the connection between morality the way it was understood by the Nazis, and the Nazi law VIKTOR KNAPP: *Problém nacistické právní filozofie*, Dobrá Voda 2002 – reprint from 1947, p. 69, 97-98, 114, 186, ISBN 80-86473-21-X.

[6] ZDENĚK KOUDELKA: Abolition of Constitutional Statue by the Constitutional Court of the Czech Republic, *Journal of Legal and Economic Issues of Central Europe* 1/2010, London, ISSN 2043-085X, p. 2-13.

[7] FRIEDRICH AUGUST von HAYEK: *The Road to Serfdom*, Phoenix Books, 1944, p. 83.

[8] Art. 89 (change of constitution) of the French Constitution from 4. October 1958. The inflexibility of the republican form of state was enacted in the year 1884.

half centuries. Since 1789, France repeatedly changed monarchy in both the absolutist and constitutional form with two concurring dynasties of the Bourbons and the Orleans. France was also an empire and republic in the form of government of the Convent, presidential form and parliamentary form, including the partial presidential form.[9]

The constitutional body states what the part of the constitutionality is. The constitutional body is identical with the legislative body in the Czech Republic (Parliament). A bill of a constitutional statute which is marked as a bill of a constitutional statute has to be enacted by a qualified majority within a certain procedure which is different from the procedure to enact an ordinary statute (the consent of both parliamentary chambers is needed). The legitimacy of the constitutional order (supremacy in the legal force) in secular democratic state is given by the wider consent of the society which is represented in the Parliament in the system of representative democracy. This wider consent is determinated by more rigorous procedural rules for enacting the constitutional statutes. The rigidity of the Czech constitution is not very significant in contrast with some other constitutional systems which request, e.g., ratification plebiscite[10], consent of other state bodies[11] or choice of a special constitutional convent for the change of the constitution.[12] Systems with a flexible constitution which can be changed with an ordinary statute (Great Britain) also have their own legitimacy

[9] Till the year 1789 - the absolute monarchy of the Bourbons, then the constitutional monarchy till 1792. 1792-1804 was the form of state republic (first governed by the assembly and gradually by consul as dictator). In 1804-14, the empire followed with a short 100 day epilogue in the year 1815. Since the year 1814, the kingdom of the Bourbons was restored in a constitutional form but there were tendencies to restore absolutism which in 1830 led to the overthrowing of the Bourbons, and the Orleans got to power in the form of constitutional monarchy. The constitutional monarchy was in 1848 replaced by presidential republic which was changed to kingdom in 1952. After 1870, the republic in its parliamentary form lasted till 1958 with a break when the totalitarian Vichy Republic 1940-44 was created. In the year 1958, a classical form of partial presidential republic was established by Charles de Gaulle.

[10] In Denmark, the consent of the chamber of representatives is needed which is then broken up. The newly elected chamber of representatives has to agree with the change of constitution in the same text, then a ratification plebiscite follows, and then the king's consent is requested. See § 88 of the Constitution of Denmark from 5. June 1953.

[11] In the USA, the constitutional amendments have to be first enacted by 2/3 of the Congress and then the ratification consent of ¾ of Parliaments of the member states of the federation follows. A possible but not implemented option is choosing special bodies – convents – for the state ratification as well as for the federal level. See Art. V of the Constitution of the United States from 17. September 1787. Similarly, the Chapters 3-8 of the Constitution in Russia can be changed by the federal constitutional statute of the Federal assembly, which is afterwards approved by 2/3 of the citizens of the Russian federation. Art. 136 of the Russian Constitution from 12. December 1993.

[12] In Russia, it is possible to change Ch. 1 (The Fundamentals of the Constitutional System), Ch. 2 (Rights and Freedoms of Man and Citizen) and Ch. 9 (Constitutional Review) only with the 3/5 consent of both the chambers of Parliament. A special constitutive assembly is established which prepares a draft bill of the new constitution which will be passed by 2/3 of all the members of the constitutive assembly or by a plebiscite. Art. 135 of Constitution of Russia.

– here is no need for the constitutional court as a guardian of the constitutionality.

From this point of view, it is possible to regard the inflexibility of the constitution as a relative[13] self-limitation of the sovereign which can be withdrawn because no sovereign as a creator of the constitution is everlasting. A sovereign in a monarchy or the nation in democracy change with the death of the old and with the birth of the new people, including opinions about what the public good is. Formally, the sovereign is still the same - a monarch or the nation, but their substantiality is different. The clause of inflexibility can be changed[14] – extended, reduced and abolished.

The Religious Point of View

From the religious point of view, the desire for seeking the transcendental basis of constitution via its material gist while refusing this basis in God is only the expression of the drive for seeking God out of God. It is the pagan's desire to raise the material gist of constitution to a new divinity which everybody, including the constitutional body, has to worship. Thereafter, the Constitutional Court has a tendency to appoint itself as its absolute interpreter, therefore, a new clergy.

It is the consequence of depriving the constitution of God, but there still exists the drive for something transcendental, which is out of the disposition of the constitutional body and which is newly called a material gist of constitution. It reminds of the Nietzsches' words: "*Who left God, believes in morality much stronger*."[15] It is the same as the 3. Moses book describes the Jews impatiently waiting for Moses to return from the Sinai. The Jews persuaded Moses' brother Aron to build them a golden statue of a bull-calf which they could worship.[16] An idol is always an idol although it is made of gold. After rejection of a divine basis, the constitutional body has to act rigorously and has to face the fact that everything is now in the hands of man. Between the human and the divine there is nothing transitive. There is nothing superhuman and at the same time non-

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[13] Inflexibility of constitutions is relative. "*It is not possible to presume naively that such a change is not possible in fact. It is something different: the current system has to use all the available instruments to prevent from such a change*." VOJTĚCH ŠIMÍČEK: Materiální ohnisko ústavního pořádku, jeho ochrana a nález ÚS ve věci M. Melčáka, in *Vladimír Klokočka Liber amicorum*, Praha 2009, p. 223, ISBN 978-80-7201-793-5.

[14] „ *... impossible is the norm which expressly prohibits change of the legal order or of some of its part. ...If I know under which conditions such a norm was create, than I have to admit logically that under the same conditions the change or abolishing of such a norm is legally possible*." FRANTIŠEK WEYR: *Základy filozofie právní*, Brno 1920, p. 105-106 note 18.

[15] FRIEDRICH NIETZSCHE: *Der Wille zur Macht*, book 1 (Der europäische Nihilismus), chapter 2 (Wesen und Ursache), punctum 36, Alfred Kröner Verlag in Leipzig 1919, p. 20.

[16] Exodus (Ex) chapter 32. Ecumencail translation of the Bible, 2nd edition Stuttgart 1984, p. 81-82.

divine. Human creature, also in the form of the core of the Constitution, remains only a human creature and has to be assessed that way.[17] **Creating the material gist of constitution as something inflexible that is beyond the disposition of the constitutional body and the sovereign (people) is only an attempt to create an idol – a golden calf – in constitutional law.**

A Democratic Point of View

Consent of the majority is the only source of legitimacy in a secular society. Although the government of the majority has its problems, it is the base of democracy which cannot be abolished without loosing the democratic regime. The majority of democratic states enacted rigidity of the fundamental legal rules which they called constitutional legal rules. In order to enact and change such rules, the qualified majority is needed. This procedure provides a wider consent of the society concerning the constitutional norms in contrast to a lesser consent which is required for ordinary statutes. This wider consent brings also a bigger stability of constitutional norms. Nevertheless, the statement of constitutional norms stays within the Parliament, as the body representing the people or the nation itself decides about the constitutional norms in a plebiscite, or a combination is possible as well. Yet everything is within the democracy, which does not have, and cannot have, any other basis of sovereign power than the people. Democracy is based on the faith in people, which fully represents the words of Tomáš Garrigue Masaryk: *"...democracy consists in the faith in people, in humanity and there is no faith without love, no love without faith."*.[18]

If we accept the existence of the non-defined material gist of constitution and hence the possibility of cancelling the constitutional statutes by the Constitutional Court for reasons other than the fact that the enacting procedure was imperfect, then the Constitutional Court becomes an unlimited and absolute state body which takes off the sovereignty from the people and usurps it.[19] It is

[17] „On that day, man will cast away his silver idols and his gold idols, which they made for him, to prostrate himself to moles and to bats.“ Isaiah 2, 20.

[18] KAREL ČAPEK: *Hovory s T. G. Masarykem*, Praha 1990, ISBN 80-202-0170, part 3rd Thinking and life, chapter Politics, subchapter Democracy, p. 328.

[19] See the opinion of the constitutional judge Jan Musil who stated that: "... the accepted resolution (cancelling the constitutional statute – *note ZK*) disturbs, according to my opinion, the subtle balance between the principles of democracy and legality, namely to the detriment of the principle of democracy." Musil continues: "This tendency is expression of the elitist conception of "owners of the keys to the interpretation of law" which is repeated over and over again in the history of mankind. In my opinion, it is a vicious concept which does more harm than good." Musil also reminds of the Churchill's statement about democracy as the best model of all the bad models of government. Musil expressed this opinion in the points 13, 17, 20 of the part III. *Change of paradigm of the democratic state respecting the rule of law* of the separate standpoint of the judge Jan Musil to the resolution of the Constitutional Court from 15. September 2009, Pl.ÚS 24/09 constitutional complaint against shortening of the electoral term of the Chamber of Deputies by a constitutional statute.

an attempt to find some other legitimacy in a secularized society than the consent of majority. The constitutional court gets the supremacy in the state, its sovereignty. The extent of such a power depends only on the self-limitation of the constitutional court. Provided that the constitutional court does the above mentioned things in the situation when it uses the theory of the material gist of the constitution without defining it properly, there comes up an uncertainty because the people do not know what the constitutional court considers to be the material gist. Virtually there is a rule for each uncontrollable power usurper. Such usurper cancels what he wants to cancel, and his reason is the teleological interpretation of the material gist of constitution.

Holländer argues to the alleged unconstitutionality of the constitutional statute on the shortening of the electoral term of the Parliament, that not even the constitutional statute can shorten the electoral term of the members of Parliament, because the consensus of all affected people is not ensured.[20] In this case, the constitutional court itself did not meet the requirement of the unanimity. If we accept that constitutional statutes can be cancelled if they are contradictory to the democratic regime, and the Parliament used its competences, which it was delegated by the people, against the people itself- should such an explicitness not be evident and should there not exist a demand for unanimity of the constitutional court?

Conclusion

The theory of the material gist of constitution as something unchangeable and untouchable by the people is an expression of fear of admitting the democratic consequence of depriving the constitution of the theocratic base which leads to the reign of people. Some fear of the people, regarding it for the crowd which can savage.[21] And they are right. Nevertheless, the material gist of constitutionality is nothing else than an attempt to a third way between the democratic base of power in people and the transcendental base in God. The material gist is likely to be created by the people during the first establishing of

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[20] PAVEL HOLLÄNDER: Materiální ohnisko ústavy a diskrece ústavodárce, *Právník* 4/2005, p. 314. The preference of totalitarian political parties also proves that the supporters of the material gist of constitution keep distance from the democracy – Carl Schmitt was member of the Hitler's NSDAP from 1933-45, although Schmitt lost his functions in the party in the year 1936, and Pavel Holländer was member of the Communist Party of Slovakia 1976-89. CARL SCHMITT: *Nationalsozialismus und Völkerrecht*, Berlin 1934, p. 29; *Űber die drei Arten des Rechtswissenschaftlichen Denkens*, Hamburg 1934, 67 p.; Der Führer schützt das Recht, *Deutsche Juristen-Zeitung* 15/1934, p. 945… ALEXANDER BRÖSTL, PAVEL HOLLÄNDER: K dialektike vzťahov štátnej vole a práva, *Právny obzor* 3/1985, ISSN 0032-6984, p. 244-261.

[21] It is fear of the primitive animal spirit of a human being which Hobbes expressed in his description of the society before concluding the social contract as a „*war of all against all*“ and by the quotation from Plautus „*dog eat dog*“. THOMAS HOBBES: *Leviathan*, Praha 2009, ISBN 978-80-7298-106-9, p. 88-91.

the power, but it is no longer changeable because it is out of the disposition of the people, it becomes superhuman. It is a similar third way to the one Muammar Kaddáfí created in Libya as a brand new form of state which should have been something between capitalism and communism – Jamahiriya,[22] but it was, however, only another name for a totalitarian state.

Virtually, the theory of material gist of constitution is in a similar position to the main source of law of the Nazis which was not the written law but the legal certitude coming from the spirit of the nation and from the chief's (Hitler) will. However, the spirit of the nation and the chief's will were not defined in the law of the pan-German empire; in spite of this fact, they had an upper-constitutional quality. Virtually, such a system enabled arbitrariness of the judges, which was legitimated by an alleged chief's will.[23] Also, the communistic theory of law maintains that a judge is bound by class-conditional socialistic legal conscience.[24]

Nazism, as well as communism, tolerated the religious faith but these regimes did not need such a faith. Nazism looked for some transcendental quality for a base of its law – it was the chief's will coming from the Providence. This immaterial idol, which was not golden any more, worshiped the Nazi authorities. Spectacular is the proximity of the base of the source of law of Nazis – legal certitude to the source of law in a socialist state – legal conscience.

In law, as well as in economy and politics, there is an attempt to construct a third way accompanied by an internal conflict, because people are trying to connect incompatible things. Either is the religious faith contained in the constitutional base and then the theories of material gist of constitution are useless, or we push the God out of the constitution, but then we cannot look for some transcendental base of constitution. In a secularized society, the people are the lord of the constitution, including its base (gist). Is it not dangerous and with unpredictable consequences? Yes, it is – but in there is the charm of the history. As the individual does not know his future existence, neither does the society

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[22] Džamáhírije should have been government of the masses; it means application of the direct democracy. MUAMMAR al-KADDÁFÍ: *Zelená kniha*, part one Moc lidu, chapter Lidové konference a lidové výbory, p. 33-38, undated edition at the beginning of the 1990s, distribued by the Libyan embassy in Prague. IVAN HRBEK: *Libyjská arabská lidová socialistická džamáhírija*, Praha 1982, p. 38-48.

[23] VIKTOR KNAPP: *Problém nacistické právní filozofie*, p. 62, 78, 116, 126, 179.

[24] *"Application of law represents class-conditioned regulated process motivated by state power. ...class-application and interpretation of law in decision-making activities of the courts is not contra political and constitutional principle of judicial independence (article 102 of Constitution of the Czechoslovak Socialistic Republic). We cannot understand the judicial independence as the independence from the socialistic state as a political organization of ruling working class. ...there is the element of the class division in society when the court is bound by legal order and also in their obligation to interpret law and other legal regulations in accordance with the socialistic legal knowledge."* ALEXANDER BRÖSTL, PAVEL HOLLÄNDER: K dialektike vzťahov štátnej vole a práva, *Právny obzor* 3/1985, p. 260.

know its future existence. Or its non-existence. Maybe it is terrible but it is not possible to choose between the faith connected with humility and the desire of controlling everything. The construction of a third way in the form of the material gist of constitution does not replace the difficulty of choice. The constitutional judge Jan Musil said it well: *"The idea that lawyers are those who in the last instance solve the feud between good and evil is a total mistake, and this theory was many times displaced in the history. In this case historical parallels are very often used (many of them I find totally improper), and I would like to ask one question as well: did the lawyers prevent from creation and functioning of totalitarian regimes? Did the judges not assist in the crimes of fascist and communist justice?"*[25]

[25] Point 23 Part III. *Change of paradigm of the democratic state respecting the rule of law* of the separate standpoint of the judge Jan Musil to the resolution of the Constitutional Court from 15. September 2009, Pl.ÚS 24/09 constitutional complaint against shortening of the electoral term of the Chamber of Deputies by a constitutional statute.