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Everyone has Their own Socrates

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Abstract

Law is a social construction. It focuses on the regulation of social relations. The interpretation of legal rules is constantly adapting to the social context. On the other side, the law code strongly influences society's development, determining the future social context. The Constitution, within the understanding of basic law in any country, is one of the basic legal determinants of the future social context of any country. The Constitution affects the form and the content of the future accepted legal determiners and their interpretation.

The regulation of social relations by the legal code is about the human effort to achieve insurance in this uncertain world. This effort might bring the result respecting that humanity has not invented anything more effective yet. Any state and transnational community create own superparadigm – the identical worldview of the society. Regarding the changes of the social context, with no respect to its reason, there comes logically a change of social superparadigm. The Constitution responds to it as well as there are the activities of the courts, having the rights of constitutionality defenders.

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Streszczenie

Każdy ma swojego Sokratesa

Prawo to konstrukcja społeczna. Koncentruje się na regulacji stosunków społecznych. Interpretację przepisów prawnych stale dostosowuje się do kontekstu społecznego. Z drugiej strony prawo silnie wpływa na rozwój społeczeństwa, wyznaczając przyszły kontekst społeczny. Konstytucja, w rozumieniu prawa podstawowego państwa, jest jednym z podstawowych prawnych wyznaczników przyszłego kontekstu społecznego każdego państwa. Konstytucja wpływa na kształt i treść przyjętych w przyszłości uwarunkowań prawnych oraz ich wykładnię.

Regulacja stosunków społecznych wedle wytycznych określonych prawem stanowi efekt ludziego działania w celu uzyskania zabezpieczenia. Ten wysiłek może przynieść rezultat poprzez poszanowanie tego co już zostało osiągnięte, ponieważ ludzkość dotychczas nie stworzyła jeszcze niczego bardziej efektywnego. Każde państwo i wspólnota ponadnarodowa tworzą własny superparadygmat – identyczny światopogląd społeczeństwa. Jeśli chodzi o zmiany kontekstu społecznego, bez względu na jego przyczynę, logicznie rzecz biorąc, następuje zmiana superparadygmatu społecznego. Odpowiedzią na to jest Konstytucja i działalność sądów, mających uprawnienia obrońców konstytucyjności.

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I. *Pre-Understanding* in the Shadow of the "Czech Film"

Where there is society, there is a law *(ubi societas, ibi ius).* The role of law is the regulation of social relations. To share the legal function of the generally binding rule, it has to be clearly expressed. Well, it sounds like a good question if the law is intelligible. When two lawyers meet together in a debate, there appear at least three legal opinions[2]. If the number of lawyers participating in a discourse increases with an arithmetic order, the number of legal opinions will probably grow exponentially. If they meet in the hermeneutic circle, the result might work as a gentle exercise of the intellect. Otherwise,

[2] It seems like a good basis for making jokes that lawyers so often appear in, but as David Schmidtz points out, sensible people don't agree on what's fair. D. Schmidtz, *Prvky spravedlnosti,* Praha 2015, p. 5.

there is a risk of the so-called "Spanish city"[3], resp. in our northern neighbors, the Republic of Poland *CZESKI FILM*[4].

The same as in the "Spanish city", also in the match of the qualified arguments where the result might come of a statement "I know that I do not know anything". However, it is questionable whether it is a manifestation of optimism to learn something new – or for a self-critical evaluation of one's knowledge or an overall evaluation of the discussion in question because everyone can have their "own Socrates". Nor can a critical statement be ruled out that the *discussant* knows that he knows nothing, but he knows more than the other participants in the discussion, who do not even know that they know nothing, but such an attitude would be provocative and perhaps risky for its bearer, because – he – discussant would find himself in disgrace of the discussion community, which could take revenge on him; but and fortunately in today's civilized times he does probably no longer cause headache. Presentation of arguments and counter-arguments and searching for agreement, from some "dogmatic circle" where the rock proponents of some theory meet; on which they will ultimately build an ideology that will dissolve with the demise of its bearers[5].

II. I Create the Norm, so I am … (Human Society)

Just in a simple way of observing the world, where even not a very clever observer can find out that the constant creation of rules of conduct, and at the same time the frequency and intensity of their violation, is a human matter[6]. From a certain point of view, the man is a kind of normative being[7].

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[3] E.g., Germans use the indication *Böhmisches Dorf*.

[4] The indication is inspired by the Czecho-Slovak comedy *Nikdo nic neví* from 1947.

[5] Tomáš Sobek refers to Rudolf von Jhering's satirical book Scherz und Ernst in der Jurisprudenz (1884), in which in one of its chapters (Im juristischen Begriffshimmel) he describes a dream in which he seems to have died and visited or intended for pandectists, in which they are legal concepts in their perfect, undeformed by terrestrial legislation and case law, form. T. Sobek, *Právní myšlení. Kritika moralismu*, Praha 2011, pp. 283–284.

[6] As for the human behavior, it seems to be a coevolution of genes and culture.

[7] Jaroslav Peregrin presents the hypothesis that rules are what have allowed cooperation between people to be reflected in the very essence of people and to make them rational,

What do we expect from generally binding rules of conduct?[8] From a general point of view, we expect a decrease in entropy, so we want to achieve a certain degree of homeostasis, thus some certainty in an uncertain world. Parliament is not an apolitical body striving for legislative perfection[9]. The history of legislation is also about more successful legal regulations and also about those less successful ones[10]. The accessive production of the norms tends to be called a *legislative optimism* but to be honest, sometimes it acts as a *legislative neurosis*. And here comes the question if the exceeding hypertrophy of law itself does not reduce entropy in society just in little or even if it does contribute to entropy. Society is professionally differentiated, and lawyers are naturally expected that they (it means us lawyers) would be able to formulate specifically what is still compliant with the law and what is no longer a part of it. It is clear to all of us that it is not often possible to meet such expectations. Otherwise, it would not be necessary for lawyers to be insured for professional damage, it would not be necessary to have the institute of ordinary and extraordinary remedies in a state governed by the rule of law, and there would be relatively frequent situations where someone celebrates success in a dispute, sometimes for decades, their lawyer said that everything was different because of the court of appeal, the constitutional court or the supranational court has a different legal opinion than the courts before which the case was dealt with in the first years of the proceed-

speaking and cultural beings, and that man is above all a normative being. J. Peregrin, *Člověk a pravidla,* Praha 2011, p. 13.

Apparently, the considerable neuroplasticity of the human brain is a prerequisite for the possibility of continuous rule-making.

[8] Unfortunately, it is sometimes clear from the legislation what particular interest a lobby group wanted to achieve.

[9] As stated by Jan Filip: "Those who pass the law, follow the different aim more than is the legislation perfection". J. Filip, *Legislativní technika a judikatura Ústavního soudu*, "Časopis pro právní vědu a praxis" 2005, No. 3, p. 236.

[10] The Prussian General Code of Land Law, which contained more than seventeen thousand highly case-law paragraphs, and which emphasized the literal interpretation of the law, is one of the less successful legal regulations in comparison with, e.g., with the French Civil Code of 1804, which also excluded any general normative effect of a judicial decision, but whose creators did not go into too much detail. M. Bobek, Z. Kühn, *Judikatura a právní argumentace*, 2nd edition, Praha 2013, pp. 24–25.

ings[11]. There is nothing to say about the overall social context that has been changed over time and the point of view on the substance of those things. Ultimately, however, it is quite natural that in such a case, a member of the legal profession (whether it is a lawyer, judge, etc.) becomes a thunderstorm of disgust, which on the one hand can appear worrying and frustrating for a member of the legal status, but on the other hand, it can be a source of inspiration for the artistic sphere[12].

III. Constitutional Homeostasis

We lawyers, especially those in the academic sphere, have divided the law into several different areas, and naturally, there are the specialists – theorists in criminal law, civil law, financial law, etc. It is, after all, reflected in the legal practice. Specialization also leads to cases where one becomes an expert on a particular law, or only in some of its establishment[13]. Finally, as the natural consequence of the hypertrophy of legal regulations, such specialization often leads to disharmony in the legal system as a whole. This disharmony is subsequently removed by the interpretive activity of law enforcement bodies, especially courts, being transformed into bodies that have, or should at least have a significant impact on the uniform and harmonious application of legislation rules, being, after all, indicated by its pyramidal hierarchical arrangement.

According to the established requirement of the law coherence, the different opinions of law enforcement bodies, namely bodies in the broad sense of the word, thus especially administrative bodies, may have and legitimately have dif-

[11] But we can encounter this in other areas of life as well. As a child, I saw the recommendations "one egg a day", later the egg was slowly referred to as a cholesterol bomb, so that over time the opinion again prevails that it is not so bad with those eggs.

[12] Alexander Bröstl in the book *Na konci je súd*, in the Chapter *Čo Shakespeare písal o právnikoch* cituje vetu z druhej časti hry Henrich VI. "Prvú vec, ktorú urobíme, pozabíjajme všetkých právnikov (The first thing we do, let´s kill all the lawyers)", presented by DicktheButcher and points to the possible context and interpretation of this sentence in the sense that the liquidation of lawyers is a step toward totalitarianism. A. Bröstl, *Na konci je súd*, Bratislava 2015, p. 96 et seq.

[13] Such a narrow specialist, respected by colleagues, might perhaps find it very difficult to derogate from the regulation, the application of which is a declared expert.

ferent views on the application of the law. However, their conclusions are unified by courts, with their final word – the so-called border courts. It means the courts are making decisions as to the last ones in the line. There will be the highest administrative courts, the highest courts, and especially the constitutional courts, or even a supranational court, while the formal division of the judiciary is considered as secondary, it is crucial what kind of jurisdiction it has. Although, as democratically-minded individuals, we agree that the sovereign here is the nation, accepting the fact that people cannot decide on all important issues considering the public interest, even from the point of view of the technical impossibility of making such decision on everything important.

Even if we are convinced proponents of a direct form of democracy, we will agree that not everyone can decide on everything, not even on everything that is very important. So, there is something/someone (because every state body is made up of human beings) who makes decisions in the last stage. The French conservative thinker of the so-called restoration – Joseph Maria de Maistre, understood sovereignty as a decision, more precisely as a final decision claiming infallibility. It is not that last stop to be infallible as it is infallible, but it is infallible because it is the last[14]. In this sense, the one who decides as the last one is that sovereign one. In a democratic state, defining itself as a legal one, several adepts may occur as a "holder of the right to a final decision"[15].

IV. Unconstitutional Constitutional Laws and the Right to Infallibility

During many years of my work at the Faculty of Law, I have not registered a more fundamental problem in the academic discussions, which belong to the top forums of freedom of speech, with whether the Constitutional Court of the Slovak Republic can assess the inconsistency of constitutional law with the Constitution. The wording of Article 125 of the Constitution para. 1 letter a)[16] of the Slovak Republic seemed relatively clear and did not allow for dif-

[14] A. Gerloch, *Teorie a praxe tvorby práva*, Praha 2008, p. 58.

[15] And sometimes there is a conflict, which can be, as history teaches us, quite dramatic, such as. in the event of a conflict between King Charles I and Parliament.

[16] The Constitutional Court decides on the conformity of laws with the Constitution, with constitutional laws and with international treaties, which have been approved by the

fering interpretations. What seemed questionable was, what if the Constitutional Court ruled that the law was incompatible with the Constitution, thus preventing the parliament, if there were enough deputies, not to adopting the same legal regulation as in law declared incompatible with the Constitution by the Constitutional Court in the form of constitutional law. The fact that the issue will sooner or later manifest itself in the Slovak legal environment could be assumed after the so-called case of Melčák[17], which occurred in the Czech Republic. Judgment of the Constitutional Court in the Czech Republic p. zn. Pl. ÚS 27/09, in addition to the legal effects of such a decision, also brought other consequences. As this judgment repealed the constitutional law on shortening the term of office for the Chamber of Deputies of the Parliament of the Czech Republic, it certainly had some influence on later political conditions in the parliament[18].

The other effect was the discussion over this decision, as the judgment in question attracted considerable attention from the professional public[19]. For this article, it is essential that the court acted on the incompatibility of the constitutional law with the Constitution, which means it was a regulation of the same legal force from a formal point of view. It is not the purpose of this paper to analyze in detail the judgment of CC (Constitutional Court) file number Pl. ÚS 27/09 and the considerations they followed in their decision-making. Their activities must take into account the existence of the material core of the Czech Constitution.

Symbolically on September 1, precisely on the Day of the Constitution of the Slovak Republic[20], the Constitutional Court of the Slovak Republic received

National Council of the Slovak Republic and which have been ratified and declared in the manner prescribed by law.

[17] Judgment of the Constitutional Court of the Czech Republic No.Pl. ÚS 27/09.

[18] We will certainly agree that in the case of elections that would take place earlier, the result would be different than if the elections in question took place later.

[19] However, it must be recognized that Pavel Holländer is considered the spiritual leader of the decision in question, thus he deals with the description of the case in question and the decision of the Constitutional Court as the spiritus agent of the present judgment. P. Holländer, *Příběhy právních pojmů*, Plzeň 2017, p. 140 et seq.

[20] According to § 1 of the Act of the National Council of the Slovak Republic No. 241/1993 Coll. as amended, September 1 is the national holiday Day of the Constitution of the Slovak Republic.

in the form of a fax a proposal of the Vice-President of the Judicial Council of the Slovak Republic to initiate proceedings on compliance of certain legal regulations with the Constitution of the Slovak Republic. For this article, the part of the proceedings concerning the assessment of the non-compliance of constitutional law with the Constitution is relevant[21]. In comparison with the case in the Czech Republic (the already mentioned so-called Melčák case), it seems interesting that the petitioner challenged the constitutional law by which the Constitution of the Slovak Republic was amended. The proceedings, which began in 2014, were completed at the beginning of 2019 by the judgment of file No. zn. Pl. ÚS 21/2014-96 of January 30, 2019, after more than four years, at a time when the term of office[22] of nine judges was to expire on February 16, 2019. The decision itself has 115 pages, and the material core of the Constitution is mentioned in various contexts more than thirty times. But more importantly, in the case of the Constitution of the Slovak Republic, we can talk about the so-called implicit material core of the Constitution because, unlike the Constitution of the Czech Republic, we do not find in the Slovak constitution provisions from which it could be automatically deduced that they form the material core of the Constitution[23]. Judgment of file No.Pl. ÚS 21/2014 was born for almost 4.5 years and, among other things, apparently provoked a reaction from the National Council of the Slovak Republic, which adopted in December 2020 Constitutional Act No. 422/2020 Coll., Which amended the Constitution o.i. so that in Art. 125 sec. 4 of the Constitution, a sentence was added at the end in the wording "The Constitutional Court does not decide on the compliance of the Constitutional Act with the Constitution". The only question is if this is the final point behind a possible proceeding on the incompatibility of constitutional law with the Constitution of the Slovak Republic, as the constitutional amendment was subsequently challenged in the Constitutional Court at the end of 2020.

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[21] Compliance with the provisions of Art. 154d sec. 1 to 3 of Constitutional Act No. 161/2014 Coll., Amending the Constitution of the Slovak Republic No. 460/1992 Coll. as amended, with Art. 1 sec. 1, Art. 141 sec. 1, Art. 144 sec. 1 and Art. 145 sec. 1 of the Constitution of the Slovak Republic.

[22] The Constitutional Court of the Slovak Republic consists of thirteen judges.

[23] In the case of the Constitution of the Czech Republic, it has a specific status art. 9 sec. 2 The substantive requisites of the democratic, law-abiding State may not be amended.

Human attention is selective. The issues of the material core of the Constitution, the material focus of the Constitution, the eternity clause, etc., are frequent topics in the literature that mentions the decision-making practice of constitutional courts. The potential of this issue does not seem to be exhausted and raises more and more questions. Can the material core of the Constitution be precisely defined at all, or does it depend on the current social context? Can a collision occur between an explicit material core and an implicit material core?

Zdeněk Koudelka points out that in the case of the so-called material core, it is the searching process of the transcendental basis of the Constitution, and it is compared to the golden calf of constitutionality[24]. Pavel Holländer, on the other hand, talks about Constructive Metaphysics[25] in connection with the material focus of the Constitution. Substantially, the two other cited authors similarly present the material core as something transcendental or metaphysical[26], but from different points of view and diametrically different conclusions. The search for something "higher" that is superfluous concerns not only the material core of the Constitution. Likewise, the search for the value basis of the Constitution is the search for something that cannot be taken into account in a conflict – constitutional situation – the search for something transcendental. Is it not the material core of the Constitution or the material focus of the institution, which, in a certain situation, will be filled with the circumstances arising from the social reality (social context), and will it be used? Regardless of the opinion, whether it uses or meaning, it will be used or abused.

Legislatively, it is not a problem to constitutionally enshrine the eternity clause and mark some Constitution provisions as immutable. As humanity, we have our experience with immutability, and it is not appropriate to automatically associate it with irony. However, we are certainly aware that the next generation will adjust social relations as it pleases, regardless of whether or

[24] Z. Koudelka, *Zlaté tele ústavnosti*, "Časopis pro právní vědu a praxis" 2010, No. 3, pp. 257–262.

[25] P. Holländer, *Filosofie práva*, Plzeň 2006, p. 47 et seq.

[26] If we use the term "metaphysics", then it is necessary to agree on the meaning in which we apply it. Andronikos of Rhodes classified Aristotle's writings on the first philosophy as writings on nature – physis. So, if we start from something, some context behind the law, it is meta-law.

not the current generation commits them to something. In a letter to James Madison (1751–1836), Thomas Jefferson (1743–1826) wrote that all constitutions, laws, and debts would expire at the end of one generation and calculated the duration of one generation to be 19 years[27]. But we also realize that social change is ongoing, sometimes revolutionary, but usually more evolutionary, which means that the current state affects the future. We can illustrate this very well with examples from various areas of social life, e.g., the economy, the development of government debt, which will burden future generations, etc.

It would be difficult to find anyone who would claim that a nuclear accident would not affect future generations or that the national debt would be wiped out at the end of one generation[28].

Legal regulations are criticizable for their possible overuse or other various reasons, but they cannot be denied at a certain result: they regulate – more or less successfully – the coexistence of an increasing number of people in a limited space. Just the time frame of repayment of government bonds or the length of repayment of mortgage loans currently often exceed 19 years (as Thomas Jefferson would probably say), and we would find many other examples. The eternity clause certainly does not guarantee eternity to the construction of any constitutional relations, but it certainly strengthens the position of the state apparatus, which would like to maintain the *status quo*. It increases the degree of stability. The material core, in turn, leaves room for such an interpretation of the Constitution, which will take into account the social context and thus move it through the meta separating the unconstitutional from the constitutional.

V. Conclusion

The material core of the Constitution may not be the golden calf of constitutional law by constructive metaphysics. However, it can be a tool that allows harmonizing the existing normative regulation with the social context, in social reality, in situations where no other solution is currently available. However, every branch of state power can abuse its position. It is a fact that the

[27] T. Sobek, op.cit., p. 410.

[28] Just if so in the election programme of the extreme populist.

influence of the judiciary, and in particular the constitutional judiciary, has grown significantly in recent decades. It is also a fact that even a democratically elected parliament does not have to reflect precisely what the source of power in a democratic state, the people, wants.

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