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

by Andrea Domokos

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 of 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 besides the law-giver..."[1]

István Kukorelli – Károly Tóth : 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".[2]

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.

Also, Tibor Király previously stated before the political transformation that punitive powers must never be unlimited.[3] The Constitutional Court in its decisions has searched for an answer to the question: where do the boundaries lie.

András Szabó wrote in 1989 that „...law should stand on its own merits", - even without moral and without motivation. „This law, valid in and by itself, is able to promote general detention with deterrence even when every other motivational factor fails". We should be unafraid of contributing a deterrent role to law employing force because using force is no more unethical than violating the law.[4]

Law anticipating and using force is precisely necessary because when an infringement is committed, the noble motives are missing that would prevent the use of force. Retaliatory and deterrent criminal law is the ultima ratio, which is 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 the law-abiding culture, nor can it be an alternative for all the above. Criminal law does not redeem, instead, it retaliates..."[5]

In decision 23/1990. (X.3.) AB (Hungarian abbreviation for Constitutional Court), András Szabó further specifies in his parallel opinion that it is not the effectiveness of penalties which forms the basis of penalties, but the principle of „Sin must not go unpunished and sin deserves punishment".

Criminal penalties should not necessarily be linked to accomplishing a goal or suitable for the goal, since applying the penalties in spite of not being effective or not reaching the objectives can be still necessary, right, and justified.

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[1] Nagy F.: Tanulmányok a BTK Általános Részének kodifikációjához. HVGORAC, Budapest, 2005.12.
[2] Kukorelli I. - Tóth K.: A rendszerváltozás államszervezeti kompromisszumai. Antológia Kiadó, Lakitelek, 2016. 406.
[3] Király T.: A büntetőhatalom korlátai. 1988. in: Szemelvények ötven év büntetőjogi és más tárgyú tanulmányaiból. ELTE ÁJK Büntetőeljárási jogi és büntetésvégrehajtási jogi Tanszék, Budapest, 2005. 203.
[4] Szabó A.: *A* büntetőjog reformjáról és a reform büntetőjogáról. In: Kriminológiai Közlemények. 26-27.sz. Budapest, 1989, .44-94, 77

[5] Ibid p. 77.

The 'sin deserves punishment' principle can be realized 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 sanctions of other branches of law, András Szabó states that criminal sentences has no reparative, restorative, or duty statuer role.[6]

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

The demands of criminal law cannot be violated 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 infringement of the inviolable law, which is synonymous with the principle of proportionate penalties.

The principle of proportional penalty excludes purpose oriented punishment because what the latter requires and allows is not the proportioning to the gravity of the harm, but the referencing to the target.

For example, if we considered the purpose to be moral education or treatment, then in the case of a serious criminal offense, 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 infringement of inviolable law and the retaliatory and proportionate penalty is more humane than the purpose oriented one. Though the latter seems to be humane and correcting in nature, the former one 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.

According to András Szabó, it is the retaliatory punishment that indeed has respect for the individual since it does not step in the place or role of a psychologist or social worker. Therefore, 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 the execution of the sentence.[7]

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 realized when the Constitution is being taken into effect indeed 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 harmonized with the Constitution of rule of law, as

[6] 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.

[7] Szabó A.: *A* büntetőjog reformjáról és a reform büntetőjogáról. In: Kriminológiai Közlemények. 26-27.sz. Budapest, 1989, .44-94, 77

well as in view of the new legislative act, which must be held in unity". Resolution 11/1992. (III.5.) AB.

The same decision emphasizes that the state must not have unlimited punitive power, as the public authority itself is never unlimited either. Public authorities may intervene into the basic freedoms and rights of an individual - *„lege ferenda"* - only with constitutional authorization and on 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) that is the last resort among all legal consequences, which states that it is the ultimate instrument among all possible legal consequences.

The AB decision also holds that criminal law in 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 „charter" for the protection of individual rights.

Constitutional principles likewise become evident through the fact that both criminalization and fixed penalties are regulated by law. Establishing criminalization and threatening with punishment must have a firm rationale predicated upon constitutional grounds, which implies that they must be necessary, proportionate, and applied actions in the long run.

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, again the applicability of criminal law as a last resort is being emphasized when it is stated that „criminal law 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 proven to be no longer helpful.

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

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

Exercising the punitive powers will necessarily affect the constitutional, fundamental rights of individuals.

The duties of the state derived from the Constitution justify the right of the bodies of state exercising powers to have efficient means for performing their statutory tasks, even if these instruments seriously limit personal rights by nature.

The decision also discusses the issue of the execution 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 interferencing into core human rights is the final judgment that is reached in criminal proceedings.

However, actual restriction and interference take place during the time of the enforcement of a conviction. Although the change is brought about legally in the condition of individuals legal conviction, the genuine change is made sensible 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 criminalization 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, if 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 to a strict minimum to achieve its objectives in compliance with the applicable requirements when it is restricting basic constitutional rights?

According to the requirements of constitutional criminal law, the disposition 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 discussed criminal conduct is a constitutional requirement.

„The message must be clearly articulated as to when an individual commits an offense sanctioned by criminal law. At the same time, it should restrict enforcers from giving potentially arbitrated interpretations to the law. Care must, therefore, be taken that the definition 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 none other, but the replacement of the former term „socialist".

He holds that since this new attributive was only necessary when the criminal law was identical with the legal rules, today using any kind of branding is unjustified. [8]

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 a correct conceptualization of the terms".[9]

Ferenc Nagy does not consider the usage of 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 invincible barrier.[10]

„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 fundamental rights incorporated in the Constitution".[5]

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 among other things, 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.

The Constitutional Court has 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 Article 54 of the same. 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 barrier to the punitive authority of the state.

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[8] Wiener A.I: Büntetőpolitika-büntetőjog in: Büntetendőség-büntethetőség. (szerk. Wiener) KJK-KERSZÖV. Budapest, 2000. 31.

[9] Wiener A.I: Büntetőpolitika-büntetőjog in: Büntetendőség-büntethetőség. (szerk. Wiener) KJK-KERSZÖV. Budapest, 2000. 31.

[10] Nagy F*:* A magyar büntetőjog általános része. Budapest, 2004. 37-38.

The first paragraph of Article 6 of the International Covenant on Civil and Political Rights – of which Hungary is also a party and which was proclaimed by Act 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 the political transformation raised was whether justice should be done. The Parliament passed a bill on 4 November 1991 answered this question:

„Could capital offenses 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 rule of law may respond to infringements only in accordance with the rule of law. Guarantees of the rule of law are applicable to all. Laws should be clear, comprehensible and predictable. Provided that these principles are observed, the prohibition of the retroactivity of the law, and the ban of regularizing ex post facto 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 law-giver 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 formalized procedures and legal institutions can operate in a constitutional way only 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 be examined only in relation thereto.

The Constitution cannot ensure a legal right for 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 fulfill by establishing adequate institutions – ones that first of all provide procedural guarantees - and also assures the respective individual rights.

Therefore, the Constitution provides rights for the procedures which are necessary and in most cases, adequate for enforcing substantive justice.

The Constitutional Court expressed its view in several decisions concerning the constitutional aspects of the criminalization 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 adequate 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 case of limiting constitutional basic rights.

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

The Constitutional Court emphasized 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:

„With having the foundation of value system of rule of law, while avoiding the guarantees of rule of law, even righteous claims cannot be validated".
Regarding the Law of Lustration, the decision emphasized that while the given historical situation can be taken into consideration, putting aside the foundational guarantees of rule of law with the excuse of the historical context and referencing to justice required by rule of law, is unacceptable.

Rule of law cannot be practiced in conflict with rule of law.

Objective legal certainty, which rests on formal principles, is superior over always partial and subjective justice.

The Constitutional Court cannot disregard history since its mission is also historical in nature. Also, the Constitutional Court is the trustee of the paradox of „revolution through 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 righteous demands cannot be validated, if the validation would require ignoring the guarantees of rule of law. Albeit, justice and moral justification may be a motivation of penalization and of the need of serving justice. However, the legal ground for punishment must 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, which 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" - the decision states.

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 crystallized in the constitutional democracies throughout history and also served as a foundation during the constitutional revision in the year 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 realized when the Constitution is taken into effect in reality and unconditionally. As previously stated, for law, political transformation means, legal transition is exclusively possible in the sense that the whole legal system has to be harmonized 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 society. This is rule of law, this makes the Constitution a reality. The realization of rule of law is a process. It is the constitutional obligation of public authorities to labour for its fulfillment. 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 deriving 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 the „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 the time at which they were 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 no two types of standards either. The time of origin of certain legislations 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 with acknowledging the legal continuity and legality, can be relevant in regard of two aspects. The first question is: What can be done with the legal relations that had been created on the basis of old regulations, which over time have become unconstitutional and can they be brought into conformity with the Constitution?

The second question: 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 should also be answered in compliance with the requirements of rule of law.

Csaba Varga criticises the decision made by the Constitutional Court concerning ministering justice very sharply.[11] According to his view, the Constitutional Court shattered the underlying issue with its dismissive formal decision, instead of contributing to the solution of 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 levels criticism against the approach of the Constitutional Court:

„It seems that the Constitutional Court interprets justice with reference to the application of law, rather than to the creation of law, and justice has been pushed into the background in favor of legal certainty according to the interpretation of Constitutional Court".[12]

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 the law honours human rights. In his work written in 1907, he stated that the 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 in honouring the human individual".[13]

Pauler defines fair law as the ideal law. „The state, therefore, while guiding its citizens towards the realization of true culture will also be seen as a rule of law since it also intends to possibly comply with the requirements of law".

According to Wiener, rule of law is a concept of legal philosophy of which objective justice and legal certainty are also elements.[14] According to Ligeti's wording, after the collapse of former communist systems, it became timely and relevant again to demonstrate the boundaries of criminal law under rule of law and the relationship between criminal law and the Criminal Code.[15]

To show how much the former communist countries are of the same background, he used a very relevant quotation:

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[11] Varga Cs.: Teória s gyakorlatiasság a jogban: A jogtechnika varázsszerepe. in: Emlékkönyv. Losonczy István professzor halálának 25. évfordulójára (szerk.) Gál István László, Kőhalmi László. Pécs, 2005. 317.

[12] Wiener A.I: Büntetőpolitika-büntetőjog in: Büntetendőség-büntethetőség. (szerk. Wiener) KJK-KERSZÖV. Budapest, 2000. 31.

[13] Pauler Á.: Az ethikai megismerés természete.Franklin-Társulat, Budapest, 1907, 228

[14] Wiener A. I. :, Büntetőjogunk az ezredfordulón. In: Acta Facultatis Politico-iuridicae Universitatis Budapestiensis XL, (2003), 7-54

[15] .Ligeti K.: A jogállami büntetőjogról. In: Büntetendőség-büntethetőség. (szerk. Wiener), KJK-KERSZÖV, Budapest, 2000, 84

„We expected justice, but received rule of law instead”.[16]

These were the words of the former Eastern 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”.[17]

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 with the pragmatics of criminal policy and hiding under its disguise”.[18]

I, myself, hold the requirements of criminal law under rule of law and of constitutional requirements of the criminal law as normative.

I highly appreciate the role of the Constitutional Court in this that is 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 righteous demands cannot be validated, if the validation would require putting aside the guarantees of rule of law.

[16] Ibid., p.88

[17] Ibid., p.88

[18] Nagy F.: Tanulmányok a BTK Általános Részének kodifikációjához. HVGORAC, Budapest, 2005.12.