

## *The Role Played by the Constitutional Tribunal in Preserving the Liberal Nature of the Habsburg Monarchy at the Turn of the 19<sup>th</sup> Century*

It was on the basis of the constitutional laws of 21 December 1867 that were referred to as the December Constitution that the Austrian monarchy became the first European *Rechtsstaat*. Upon the *Ausgleich* with the Hungarians the Austrian Constitution reflected all these significant components of the German concept of *Rechtsstaat* that could not be brought into effect at the time of the Springtime of Nations 1848–1849. Among them there were the priority as given to the Constitution, separation of powers, subjecting the State apparatus to law, independent courts and independent judges as well as the catalogue of civil rights and liberties.<sup>1</sup> The constitutional law on the universal civil rights of 1867 contained the most developed system of the rights of an individual in Europe of the time. It is until now that the basic rights (*Grundrechte*) contained in this law specify the constitutional scope of civil rights in Austria.

What was however the major guarantor of securing the constitutional order were the three tribunals of public law: the Constitutional Tribunal (*Reichsgericht*), the Administrative Tribunal (*Verwaltungsgerichtshof*), and the Tribunal of State (*Staatsgerichtshof*). Although the Constitutional Tribunal which functioned from 1869 was not competent to check whether the laws were consistent with the Constitution, nevertheless it safeguarded the Constitution since it examined the complaints filed by the citizens against the State agencies' infringements of the Constitution-guaranteed basic rights.

The Administrative Tribunal, which came to being in 1876, examined, in its turn, the complaints against these administrative decisions which infringed the law. Upon finding them illegal, the Tribunal quashed them. The Tribunal of State, in its turn, was the institution whose task was to try the ministers who infringed the Constitution and the laws. This Tribunal was a successful instrument (resembling the American Supreme Court which would try impeachment cases) which was designed to lay the foundations of the constitutional responsibility of the high-positioned public functionaries of the *Rechtsstaat*. In the 20<sup>th</sup> century this instrument was accepted *inter alia* in Poland.

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<sup>1</sup> A. Dziadzio, *Koncepcja państwa prawa w XIX wieku – idea i rzeczywistość*, “Czasopismo Prawno-Historyczne”, vol. LVII, 2005, z. 1, p. 186.

In Austria, on account of its constitutional function the most important guarantor of the liberal constitutional order was the Constitutional Tribunal. This Tribunal acquired a high-ranking position in the Austrian system of constitutional monarchy. This was among others due to the fact that those who were sitting in it were the most outstanding representatives of the world of learning that recruited themselves from all the significant centres (Vienna, Prague, Cracow, Lvov). It was Józef Unger (d. 1913), the most eminent civilist of the time,<sup>2</sup> who for 32 years was the president of the Constitutional Tribunal. The Constitutional Tribunal gained a high ranking reputation in the eyes of the Austrian public opinion also because while examining the ideological or political questions that were important from the point of view of the State authorities it proved capable of issuing the decisions in defiance of the State agencies' expectations. Thus, in 1886, it opposed the State agencies' attempts to introduce a ban on the establishing by the Old Catholics their own religious associations, the ban in question being motivated by the tendency to defend the Catholic character of the State.

The Austrian bureaucracy treated the decisions issued by the Constitutional Tribunal as a set of legal principles that took on character of precedents because the complaints that were filed with the Tribunal aimed at the obtaining by those who filed them of the binding interpretation of the sense of constitutional civil rights and liberties. This interpretation was arrived at through the considering of specific decisions of administrative agencies such as the prohibition of the activities of certain associations. Without any exaggeration one may say that the State apparatus treated the decisions of the Constitutional Tribunal as the *Twelve Tables* of the Austrian constitutional law. Despite the fact that the decisions of the Tribunal were only of declarative (moral) nature, in practice they were fully implemented by the administration.

The constitutional system introduced in 1867 by the December Constitution laid the foundations for many political and social tendencies among various groupings in Austria. In the course of time these groupings began to regard the liberal and multinational character of the State as an impediment to reach the purposes that they planned to achieve. What became particularly anticonstitutional was the nationalistic movement of Germans in Austria. Its social significance grew after Kazimierz Badeni's Cabinet introduced, by 1897, the linguistic equality in the area of the Czech Crown. The Germans considered themselves humiliated by this regulation since the latter provided that all officials would have to have a good command of two languages. That meant that the Germans would have to necessarily learn Czech if they wanted to continue holding their official posts.

The German nationalistic movement in Austria was anti-Habsburg, anti-Slavic, anti-semitic and anti-Catholic. The nationalists put forth the slogan promoting their separation from Austria since they tended *irredenta Germanica, zu bilden* under the sepre of the Hohenzollerns. They inspired the emergence of the social movement that was referred to as *Los von Rom*. The movement called on the Germans to leave the Catholic Church and join the Protestant denomination as "the national" German religion. This movement patronized also the initiative that was called *Freie Schule*. The objective of the latter was to liberate the school instruction from the influence of the Catholic religion.

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<sup>2</sup> *Idem, Monarchia konstytucyjna w Austrii 1867–1914. Władza. Obywatel. Prawo*, Księgarnia Akademicka, Kraków 2002, p. 64.

In 1885 the program of the German nationalistic movement was supplemented by the “Aryan” paragraph which forbade the admittance to this party the individuals of Jewish extraction. Apart from the nationalistic movement there also came to being the German Radical Party which demanded the separation of the Church from the State, the secular school, and the fully secularized matrimonial law. The propaganda of nationalistic movement usually led to the abuse of freedom of speech and press. The State apparatus tried to suppress the xenophobia and racism and in making the efforts to do this was supported by the Constitutional Tribunal. The latter, as a rule, regarded as consistent with the Constitution the decisions of the authorities that prohibited the activities of the societies that promoted the racist programs.

Apart from the nationalistic tendencies, equally strong – in the declining years of the Austrian monarchy – was also the drift toward the secularization of the State. The fight for the secular nature of State and law was made by the circles of the Vienna liberal press linked with the lay Jewish milieu. Sometimes this fight put on the character of the crusade against the Catholic Church. Those who actively joined that fight were the Austrian Socialdemocrats. Also the groups of the Vienna modernism fought against the Catholic tradition. It was Sigismund Freud’s psychoanalysis which became the “ideology” of modernism. At the turn of the 20<sup>th</sup> century the public life in Austria was almost tantamount to *bellum ominium contra omnes*.

The blow dealt upon the State and the Catholic Church caused that the two institutions yielded to the syndrom of the “besieged fortress”. Because indeed they were attacked from various sides: by nationalism, libertinism, socialism and modernism. That led to the forming of a natural alliance between the State and the Church, the alliance being patronized by successor to the throne Archduke Francis Ferdinand who inter alia became the President of the Catholic Scholastic Association. The Court new elite sought the support of the Church which was the strongest public corporation that did not contest the Habsburg State. The already extreme old age of Emperor Francis Joseph I caused that the reins of the government tended to shift into the hands of the successor to the throne. The decided support secured by Francis Ferdinand to the Church institutions was a visible sign encouraging the authorities to undertake the activities that defended the Catholic character of the State.

The political hinterland of the discussed alliance was partly made up by the Christian-Social Party whose program resounded also with the nationalistic and anti-Semitic slogans but on the other hand demonstrated the pro-Habsburg attitude. In its ideology the slogan *Los von Rom*, was set against the concept *Los von Rom ist los von Österreich*. The fact that in these circumstances there followed no far-reaching clericalism of the Austrian State structures was due to the Constitutional Tribunal which, in its decisions, opposed the suppression of the freethinking societies. Before the Constitutional Tribunal the state authorities did not try to conceal their attitude. They demonstrated that they with all possible means tended toward delegating such societies.<sup>3</sup> The Constitutional Tribunal did not give its consent however to stigmatizing the lay societies with anti-State or anarchistic tendencies. It expressly let the State apparatus learn that the negative opinion

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<sup>3</sup> *Idem*, *Ochrona praw i wolności obywatelskich w austriackiej monarchii konstytucyjnej (1867–1914)*, “Czasopismo Prawno-Historyczne”, vol. LIII, 2001, z. 1, p. 267.

on these societies could be authorized if made by the State as the exponent of the Catholic part of the society but not if made by the State as an organization that represented the interests of all citizens. Thus in its decisions the Tribunal defended the principles of the State as the entity that was liberal and that met the requirements of the *Rechtsstaat*.

At the decline of its existence the Austrian monarchy went through the days of permanent ideological and cultural war. The political situation of the Austrian monarchy of the time was paradoxical since the conservative State apparatus, together with the centrally-positioned Courts and Tribunals defended the legal order against the pressure of “civil society” which tried to fashion the state after its own mould. Some tended to have the State that would protect the rights of only one nation, the remaining part of the society being boiled down to the second category citizens. Others demanded the secular State in which the Catholic Church would be eliminated from public life.

The supreme Austrian Tribunals, and particularly the Constitutional Tribunal, may take the credit for the fact that, in spite of the pressure exerted on them by various social and political factors, they managed to preserve the liberal and constitutional order in Austria until 1914. The positive myth of Francis Joseph I’s monarchy survived although in fact the monarchy was the scene of incessant national struggles. The latter eventually put down to its fall. The survival of the myth was due to the fact that despite numerous conflicts and disputes the Austrian monarchy remained until its last days the *Rechtsstaat* that defended the rights of its citizens irrespective of their national, denominational or political affiliation.

On the turn of the 20<sup>th</sup> century there was however observed a process of partial departure from the liberal assumptions of the December Constitution of 1867. Two selected examples of the decisions issued by the Administrative Tribunal and the Constitutional Tribunal in the area of freedom of religion and conscience may be illustrative of that. The first case referred to the 1870 statute-guaranteed possibility of adopting by the Austrian citizen the non-denominational status. This status allowed for contracting before the State officer the secular marriage and consequently made the divorce available. The second case referred to the statutory principle accepted in those days and pronouncing that the contributions and fees for the benefit of Churches and religious unions might be collected exclusively from the individuals who belonged to these organizations.

On the basis of provisions on the non-denominational status there was posed a question whether the child whose parents dropped the Church or the State-recognized religious union and whose parents declared being of non-denominational status, took over also the non-denominational status from his/her parents. The point was that at first the Administrative Tribunal was an advocate of the opinion which contradicted the liberal spirit of statutory law and which pronounced that – according to the Austrian legislation – each child had to be affiliated with one of the denominations which were recognized by the State. This meant that if the parents did not predetermine the denomination of their child, the administrative agencies could do that. While doing this, the agencies exercised their discretionary power and as a rule the child was classified to the Catholic milieu.

Such maneuvers of State organs contradicted the principle of *Rechtsstaat*. The latter required that imposing any legal duty on anybody should be based on the express statutory provision. This was the position adopted by the Administrative Tribunal when in 1882 it ruled that the child born to the parents who were of non-denominational status also acquired that status and consequently could obtain the upbringing that was indiffer-

ent to any religion. Such child consequently did not have to attend the religious instruction lessons at school.<sup>4</sup>

When before the last decade preceding the outbreak of World War I the process of leaving the Catholic Church by the Austrian citizens expressly intensified, the Austrian bureaucracy, while pressed by the governmental circles, attempted to restore the legal duty of providing religious instruction to children. The administrative authorities began to impose on non-denominational parents the duty to send their child to the lessons of the religion that was selected for him or her. The demand that a certain religion be selected for the child contradicted however the constitutional guarantee of freedom of religion and conscience. Nevertheless the Administrative Tribunal legitimated the activities of State agencies by introducing – beyond the *praeter legem* statute – the duty to take lessons in religion by non-denominational children.<sup>5</sup>

The problem consisted in this however that, despite the legal duty, imposed by the Administrative Tribunal decisions, to teach religion to non-denominational children, the parents of such children refused to comply with the administrative order commanding them to select some religion that the child would have to learn at school. The authorities threatened the parents with the execution of an administrative decision. The execution could be applied on the basis of the Patent of 1854. The Patent allowed to impose a fine or an arrest up to 14 days on those who refused to subordinate themselves to administrative orders.

In this situation the parents filed their complaint with the Constitutional Tribunal and raised an argument that the administrative decision in question provides for a religious coercion which is inadmissible since it contradicts the constitutional guarantee of freedom of religion and conscience. In its decision issued in 1914 the Constitutional Tribunal in fact held that the constitutional guarantee was infringed exactly because the administrative decision was safeguarded with the administrative-penal sanction. By doing this the Tribunal proved that it remained the guardian of the Constitution also in the era when the liberal spirit of December Constitution was partly being abandoned.

The second of the discussed Administrative Tribunal decisions was the one in which certain symptoms of clericalism within the State structures were detectable. The case that laid foundations for the decision in question referred to the legal basis of contributions paid for the benefit of Church institutions. In its decisions the Administrative Tribunal awarded to each taxpayer in the specific Commune the right to file a complaint against the Commune authorities' decisions referring to the subsidies for the benefit of denominational institutions.

In the early period of its activities the Tribunal fully respected the liberal nature of the Austrian statutory law that was adopted in the era when the constitutional order of the monarchy was being shaped. Therefore when the non-Catholic tax-payer demanded that the finances of the Church-building Committee be not subsidized out of the funds of the Commune, the Tribunal would quash the Commune decision referring to such subsidizing.

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<sup>4</sup> *Idem, Orzecznictwo austriackiego Trybunału Administracyjnego w sprawach wyznaniowych (1876–1918)*, “Czasopismo Prawno-Historyczne”, vol. XLVII, 1995, z. 1–2, p. 128.

<sup>5</sup> *Idem, Religionszwang ohne gesetzliche Grundlage? Interkonfessionelle Verhältnisse der Rechtsprechung des Österreichischen Verwaltungsgerichtshofes 1876-1918. Zeitschrift für Neuere Rechtsgeschichte*, 19. Jahrgang 1997, no. 1–2, p. 78.

Thus for a long time, on the basis of the 1868 law and the principle of separation of the Church from the State as derived therefrom, the Tribunal adopted a view that the decisions on allocating the Commune funds for denominational goals of the Catholic Church were illegal. When in 1900 the Administrative Tribunal faced yet again the question of legality or illegality of the Commune subsidy for the purpose of erecting a parish church, the successor to the throne allegedly intervened in the decision-making process via the President of the Tribunal. Despite the successor's express suggestion that the Tribunal should consent to the Commune's request and not to that of the complaining tax-payers, the Tribunal resisted the pressure exerted on it by the Court circles. They say that the attitude of the Tribunal's President who did not knuckle down to the pressure of the Court of the Emperor resulted in the complaint that Francis Ferdinand was supposed to lodge with the Emperor, the complaint being tantamount to the pronouncement: "in Austria one is no longer allowed to erect churches".<sup>6</sup> The Emperor indeed took sides with the Tribunal's President and – they say – admonished the successor to the throne by arguing that the ruler could not interfere in the matters subjected to independent courts, but nevertheless quite soon the Administrative Tribunal began to change its decisions in the discussed area into such that were advantageous for the Communes. The Tribunal classified the decisions relating to the allowances for the Church institutions as those that lay within the scope of free administration of the Communal property. What was sufficient for considering such decisions legal was the raising of an argument that invoked the general social interest as the justification of the subsidy. The requirements of the concept of general social interest were deemed to have been fulfilled if the purposes other than the denominational ones were indicated. Thus the church could be built out of the Communal funds if its erection was, for instance, designed to honor the succession of the Emperor to the throne, the erection being then regarded as a patriotic act. The change in the nature of decisions made by the Administrative Tribunal showed that the latter surrendered to the expectations of the bureaucracy which, at the final stage of the Austrian monarchy, operated in the ever more clerical spirit.

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### Summary

In the second part of the 19<sup>th</sup> century the Austrian monarchy was exponential of the series of features that were characteristic of the *Rechtsstaat*. In compliance with a series of Constitutional Laws that were referred to as the December Constitution of 1867, the monarchy guaranteed the observance of significant civil rights. The institutions that

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<sup>6</sup> T. Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich*, Wien 1999, p. 232.

secured the implementation of the latter were the Tribunals of public law: the Constitutional Tribunal (*Reichsgericht*), the Administrative Tribunal (*Verwaltungsgerichtshof*) and the Tribunal of State (*Staatsgerichtshof*). Particularly the Constitutional Tribunal safeguarded the Constitution by examining the complaints filed by the citizens against the State agencies' infringements of the Constitution-guaranteed basic rights. While resorting to the analysis of specific controversial cases, the present paper tries to show to what extent the Constitutional Tribunal but also the Administrative Tribunal had their share in supporting the image of Austria as the *Rechtsstaat*. The author of the paper emphasizes that this was not an easy task to carry out. On one side there were observable the growing libertarian, nationalistic, modernist and socialdemocratic tendencies, very hostile toward the traditional State and the Church. On the other side there was detectable the consolidation of clerical tendencies in the Emperor's Court circles that tried to exert a pressure on the Tribunals. This rendered the keeping of balance between the two tendencies ever more difficult.