Anikó RAISZ

Some Current Issues of International Law from the Perspective of Central and Eastern European Countries

Concept for the CEPN Junior Programme Textbook on International Law[1]

A defining element of the history of the Central and Eastern European states (which in this case roughly coincide with the countries whose territory is located, in whole or in part, in the territory of the former Austro-Hungarian Empire), which holds implications for international legal relations today, is that many questions remained unanswered. To use a now common expression, countries with a more fortunate history than ours are surprised to find that issues are evident in this region that are no longer evident to them, particularly in relation to the international protection of human rights or sovereignty, and vice versa. We do not understand why communist symbols,[2] which are clearly reminiscent of infringements in this region, cannot be banned, but what is wrong with the use of Christian symbols.[3] It is hardly clear to the

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2 See the judgement of the European Court of Human Rights (hereinafter referred to as ECtHR) in the case of ECtHR, Vajnai v. Hungary; No. 33629/06 (ECtHR, 8 July 2008), and the analysis of the case see Koltay, 2010. Further related judgment: ECtHR, Fratanoló v. Hungary; No. 29459/10 (ECtHR, November 3, 2011).

3 ECtHR, Lautsi and others v. Italy; No. 30814/06 (ECtHR, November 3, 2009). In the first Lautsi decision, the Strasbourg Court censured the Italian state for what it considered a violation of the right of children to choose their religious beliefs and the right to education and teaching in accordance with the religious and philosophical beliefs of their parents. Later, the Grand Chamber, acting on an application by Italy, found that the crucifix, as a religious symbol, contributed to Italian identity and that there was no breach of the Convention by the State. Further related judgements: ECtHR, Buscarini and others v. San Marino; No. 24645/94 (ECtHR, February 18, 1998); ECtHR, Folgerø and others v. Norway; No. 15472/02 (ECtHR, June 29, 2007).

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outside observer why we cannot rise above ethno-territorial-linguistic issues, why we insist on minority protection,[4] while being more or less generous in dealing with the encroachments on our national-preservation environment or economic spheres of interest.

For the countries of this region constitutional identity[5] (Chapter 1) is of particular importance. It is certainly not unproblematic in the general European perception, but in Central and Eastern Europe the situation is even more complicated. Constitutional identity is a question around which the world is changing,[6] and which itself is changing, despite the fact that the concept implies permanence and inalterability.[7] This paradox is an immanent element of the concept: The interactions between the phenomenon of continuity and change in the constitution[8] shape constitutional identity. Dichotomies of identity—national or constitutional, organically evolving or superimposed, static or dynamic, heterogeneous or homogeneous[9]—only complicate the picture. Constitutional courts[10] also play a key role in shaping its meaning as custodians of a society's legal values. In the context of the assertion of constitutional identity, it can be seen that this concept (well-defined, almost elitist, and therefore limited) cannot (or at least not easily) be misused. With this in mind, it is worth examining its spread and scope.

Constitutional identity appeared in the Hungarian legal literature in the 2010s,[11] and a great number of authors both at home and abroad have in fact considered constitutional identity in its European dimension.[12] The relation to the concept of national identity in Article 4(2) of the Treaty on the European Union was an inescapable theme, but the relation between constitutional identity and international law was equally important. This issue relates first and foremost to the relation between international law and national law.[13] The situation of primarily dualist states is quite different from that of monist states, not to mention hybrid systems. The relationship of the Central and Eastern European states to international law is greatly influenced by which of these systems they choose. The situation is different in Slovenia,[14] Hungary[15] or Austria.[16] To understand the Central and Eastern European approach to

4 See the initiative Minority SafePack—one million signatures for diversity in Europe.
5 Trócsányi, 2014; Trócsányi, 2006; Trócsányi and Lovászy, 2020; Trócsányi, Schanda and Csink, 2019; Trócsányi, 2016.
6 See the longtime international doyen of the issue, Mathieu, 2013.
7 Viala, 2011.
8 In his monograph, Gary Jeffrey Jacobsohn explores the issue of constitutional identity in the context of constitutional continuity and change. See Jacobsohn, 2010, p. 323.
9 Orbán, 2018.
10 Rychetsky, 2017, p. 98.
11 See inter alia Somssich, 2018; Tribl, 2018; Tribl, 2019; Szakály and Tribl, 2018.
12 Trócsányi, 2017; Varga, 2018; Rychetsky, 2017; Orbán, 2018; Faraguna, 2017; Besselink, 2010; Martin, 2012; Burgorgue-Larsen, 2011; Rousseau, 2011.
13 See for example Szmodi, 2009, p. 55.
14 See Article 8 of the Slovenian Constitution (Ustava Republike Slovenije).
15 Fundamental Law of Hungary (25 April 2011), Article Q).
16 See Article 9 of the Austrian Federal Constitution (Bundes-Verfassungsgesetz).

international law, it is first of all necessary to clarify these relations. This is not easy, not least because the picture is sometimes even interspersed with domestic dogmatic disputes,[17] which—as can be seen from a cursory examination of the constitutions concerned—are not in themselves explicit.[18]

The fact that this region has experienced the problem of state succession (Chapter 2) at first hand does not simplify the situation either.[19] It is not only elements of customary law or treaties of succession that need to be discussed, but also practical issues: the history and legal history of former Czechoslovakia or Yugoslavia provide ample examples; suffice it to refer to the development of the latter's membership of the UN[20] or the various citizenship issues in relation to the personal jurisdiction of the state. These events made Central and Eastern Europe realize that it happens to be in a unique position, and that the yardstick for its international advocacy is not necessarily written law or the classical theories once considered eternal. Until today, the ethnic question has been considered a key element in the settlement of succession issues, and the experience of the past century has shown that a peaceful settlement of this issue in accordance with international law can ensure international peace and security (Chapter 3) in the region, as defined almost as a *raison d'être* in the UN Charter. Central and Eastern European states have experienced the opposite at close quarters in the last century. For many years, Europe was less likely to be the scene of situations that threaten international peace and security, but before the events in and preceding 2022, the South Slavic war of the 1990s was also instructive in this respect, not only because of the blood sacrifices, the atrocities committed, or the dramatic consequences of the prolonged artificial state formations, but also because it showed that the world peace that the UN had set as its flag can be fragile in places where international public opinion did not expect. Today, it is more than useful for the states of the region to examine, through their own eyes, what forms of cooperation and dialogue can ensure peace in the region (and how they can help to achieve or maintain it in other regions, not only for humanitarian purposes, but also in their own well-understood interests, by respecting each other's identities). The key to achieving or maintaining peace in any region is to have strong, sovereign states. The issue of sovereignty (Chapter 4) has always been central to international law. This concept has a thousand links to the question of statehood, but also to the abovementioned constitutional identity.[21] When discussing sovereignty, it is necessary to look beyond the classical theoretical problems of international law[22] to contemporary debates of an international legal nature. The possibility of limiting sovereignty, its transferability, and its limits should

17 See also Blutman, 2017; Molnár, 2018, point 49.
18 See for instance Sulyok, 2014; Sulyok, 2013.
19 See inter alia Craven, 1998; Klabbers, 2004.
20 See in details Blum, 1992a; Blum, 1992b.
21 In her study, Réka Somssich asks the question: What is constitutional identity: "the armour protecting national identity or a branch of the European star?" See Somssich, 2018.
22 See for example the works of the classics translated into Hungarian: Hegel, 1983; Kant, 1985; Verdross, 1964.

not be circumvented. One of the largest questions today is precisely this: the room for manoeuvre of states within the framework of international cooperation (Chapter 5). The states in the region are members of roughly the same treaty and alliance system: the United Nations (UN), the North Atlantic Treaty Organization (NATO), the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE), and, more narrowly, the European Union (EU). Cooperation between the Visegrad countries is increasingly being extended, recognizing the value of involving some neighboring countries on certain issues. The different forms of cooperation partly concern different segments of national sovereignty. Within this framework, it is the sovereignty of the European Union's member states that has been subject to the most widespread and drastic interference, and to this day there are heated debates about the direction in which cooperation should continue.[23] This conglomerate, however, has long been treated by international law as a *sui generis* system, showing that the mechanisms of international law are no longer applicable to its internal functioning. However, the European Union is still based on international treaties under international law, so it is still inevitable, and not only for the Central and Eastern European states, that questions of state sovereignty in this area be examined. By comparison, the UN and the Council of Europe are classic international cooperation frameworks, but the effectiveness and political realities of these frameworks are frequently questioned. While in cases where one of the major powers is involved, there are serious doubts about the functioning, including for example the role of the Security Council in assessing situations that threaten or potentially threaten international peace and security, there are segments where, at least at the grassroots level, forward-looking cooperation has been achieved. I refer, for example, to the protection of human rights[24] (Chapter 6).

A more loosely cooperative system of human rights protection has been built up within the UN, but a more concrete accountability system within the Council of Europe. The very fact of the system's existence is a huge step forward, which could have taken place in the psychological moment after the Second World War. Its precedents, including the protection of minorities[25] (Chapter 7) so important for the region, have not been so successful, but they have shown—in retrospect—how important this area is for the whole international community (and its peace). The particular historical situation of Central-Eastern Europe raises the question: Does a mild degree of cultural relativism[26] apply to this region? That is, can and should local specificities be taken into account? Is it right to make a distinction between regions[27] when awarding compensation for the same type of infringement, while at other times ignoring the serious legacy of the region's recent history?[28] Are there limits to

23 Bogdandy, 2016.
24 Mathieu, 2017.
25 Kovács, 1996; Szalayné Sándor, 2003.
26 O'Sullivan, 2004; Otto, 1997–1998; Ramcharan, 2000; Stamoulas, 2004.
27 See also Strasbourg practice on property rights infringements in relation to real estate: Raisz, 2010.
28 See the Vajnai case cited above.

evolutionary interpretation? International lawyers in the region must find the right answers themselves. Although Central and Eastern Europe is not one of the regions most exposed to it, it is worth mentioning the issue of international terrorism, which is also a topical issue from the point of view of international criminal law (Chapter 8) and the human rights restrictions introduced as part of the defence.

Today, we cannot talk about current issues of international law without addressing the issue of migration (Chapter 9). In the ensuing controversy, purely legal arguments have seldom been heard, if only because of the nature of the subject. However, it is advisable to examine international regulation and practice from the perspective of the Central and Eastern European states and their constitutional identity, since this topic is particularly relevant to the role played by the various ways of interpreting international treaties,[29] and to the impact of the various forms of international assistance and their consequences.[30]

Another identity issue essential for Central-Eastern Europe is the protection of cultural heritage (Chapter 10). It is interesting to examine the international law perspective of preserving the intellectual and material values as well as its contribution to a cooperating region guided by mutual respect, with reference to good practices all around the world.

No responsible state can ignore the fact that crises related to international environmental law (Chapter 11) have contributed, at least in part, to other types of crises. However, we do not have to go to the Third World to experience such an environmental crisis whose negative cross-border effects do not spare neighboring countries.[31] In particular, but not exclusively, international water law is an area where in-depth knowledge, wide-ranging, strictly interdisciplinary expertise, and, of course, determined cooperation are needed to find the right solution.

The Central-Eastern European region has already made use of a fairly wide range of international dispute settlement methods (Chapter 12),[32] for example to settle disputes on international water law, as just mentioned. It is in the interest of regions with states of similar size to develop and use international dispute settlement methods, since, as disputes inevitably arise, it is best to find a consensual solution that everyone can mutually accept in their own best interests. After mapping out the positive and negative experiences of the region in this respect, it is useful, as indicated in the introduction, to ask the right questions, so that we do not think of Sienkiewicz's words: Quo vadis, Central and Eastern Europe?

These few reflections have attempted to outline, without claiming to be exhaustive, the justification for a specific approach to international law in the Central and Eastern European region. The issue is closely linked to constitutional identity, and hence sovereignty, which, if properly cooperated with, does not hinder, but rather

29 See the problem of the application of Article 31 of the 1951 Geneva Convention.
30 See for example the Hungary Helps Programme.
31 It suffices to note the cyanide pollution in the Tisza in 2000 or the floods in the Tisza in 2001.
32 Kovács, 2009.

strengthens the coexistence of the states concerned on the international scene. One of the most important principles of contemporary international law,[33] the principle of sovereign equality, does not create situations of tension and explosion, but rather a system based on dialogue and mutual respect. International law, therefore, has no reason to fear the doctrine of constitutional identity, even in specific geographical regions such as Central and Eastern Europe, for this approach does not erode it but reinforces it. Constitutional identity can therefore be a bridge between states, especially in terms of common elements. It can be a catalyst for dialogue, a motor for common thinking, and thus it certainly deserves a place in international law.

This book aims at providing insight into a specific aspect of international law: international law regarded through the lenses of Central and Eastern Europe. The esteemed Authors chose various concrete ways to do so—making this volume a collection of essays that guide the Reader through the fields of international law as if it was a diverse but at the same time straight and logical route.

33 Charter of the United Nations Article 2.1: The Organization is based on the principle of the sovereign equality of all its Members.

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