Patterns of constitutionalism: who has the final word?

Judicial-legislative relations in Europe

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1. Introduction

The concept of "constitutionalism" refers to the idea that political power should be somehow constituted and at the same time also constrained by the constitution. Even if we accept this very simplistic definition of constitutionalism, several questions emerge: Which political body or entity is entitled to create a constitution or preserve the uncodified norms of the unwritten constitutions? Who has the competence to determine what kind of norms (written or unwritten) should be considered as part of a constitution? Who has the competence to determine the competences of political institutions and political actors (*Kompetenz-Kompetenz*)? Is there a qualitative difference between bodies which create the constitution (*pouvoir constituent originaire*) and those which amend or change it (*pouvoir constituent derive*)? Given that constitutions are written in highly abstract and ambiguous terms it should be also clarified which political body is entitled to interpret the constitution after it has been adopted. Is there a special institution or several institutions are competing for this competence? To put it more simply: who will have the final word on what the constitution consists in?

In what follows, first I will briefly show how constitutions might be defined, second, I will give an overview on the most salient questions political actors and scholars debated and decided on after the fall of the Communism in Central Europe. Third, I will present various European models of constitutionalism as far as judicial-legislative relations are concerned. The latter choice, i.e. focusing on judicial-legislative relations, might be supported by the fact that the special relationship between the legislative and judicial branches has become worldwide the most important issue of constitutionalism in the last three decades (Tate and Valinder 1995; Ginsburg 2008).

2. What is a constitution?

Constitutions are not only constituting and constraining political power, they might be regarded also as instruments of successful or unsuccessful social integration: they create expectations concerning the behaviour of the community members which are either fulfilled or not. Consequently, they might contribute to the coordination of social interactions within the political community as far as fundamental behavioural norms are concerned (Hardin 2013). Some scholars argue that constitutions should be considered as declarations of values and/or aims of the community. In this respect, constitutions might contribute also to the creation of a communal identity (King 2013). Realist perspectives on constitutionalism might open idealists' eyes and show that constitutions are outcomes of severe political struggles and not that of ideal situations. Consequently, realist critiques of normative constitutionalism argue that constitutions are always and inevitably products of power struggles and mirror the momentary power relationships, not the normative ideals we pursue (Hirschl 2013).

3. Constitutionalism in CEE: a shift from executive-legislative to judicial-legislative relations

It is not surprising at all, that during and directly after the democratic transformation processes in CEE in the early nineties political and scientific debates focused definitely on the constraining element of constitutions. Constraining the political power was the main driving force behind adopting new constitutions after decades of dominance of unconstrained political power, i.e. dictatorship and authoritarianism. In the beginning there were much discussion on legislative-executive relations, mainly focusing on how legislatures might be best equipped for constraining the executive which was considered as the main suspect for misuse of power (Saalfeld 2015). Debates focused on whether presidential, semi-presidential or parliamentary form of government contribute more to the consolidation of democracy, mainly with the outcome that legislatures must have the final word in political debates between presidents and parliaments (Cheibub 2007).[1]

From our point of view, it is, however, more important that the centre of political power shifted almost unnoticed from the executive-legislative relations towards the judicial-legislative relations from the early 90s on (Hirschl 2008). While it is certainly not true that clashes between presidents and legislatures got more and more rare as we have moved away from the moment of democratic transformation, in the meantime a new power centre has emerged mainly as an unintended consequence of the democratic transformation (Rios-Figueroa 2015). During the next two decades sooner (e.g. in Hungary or Slovakia) or later (e.g. in Poland or Romania) constitutional courts moved into the focal point of political debates, even if constitutional courts originally were thought to be as apolitical institutions as they could be (Procházka 2002; Sadurski 2014). While it has always been argued that constitutional courts are not part of the political field, it is also true that political actors discovered the potential of having an institution which does not reflect perfectly the logic of politics and has a clearly different legitimacy structure. Political actors realized that constitutional courts might be suitable for solving political conflicts by relying on the dignified and highly abstract language of constitutionalism instead of the inferior debates of dirty politics (Shapiro 1999). The language of constitutional law had a clearly higher legitimacy than political discourse.

Consequently, contributing to the judicialization of politics became a common denominator for both constitutional courts and political actors. Politicians instrumentalized the courts and judges (with few exceptions) were keen to decide on issues brought before the court. Consequently, politically highly salient issues were decided more and more frequently by constitutional courts. In some countries (e.g in Hungary until 2010) political actors accepted the dictum of the courts criticizing only the current decision of the court but not its competence to decide on politically salient issues (Pócza et al 2019). In other countries (e.g Romania or Poland), however, court has been challenged more radically which led mainly to some kind of political backlash against constitutional courts.

[1] There were two kinds of exceptions from this general rule: first, if there was a popular leader of the democratic opposition (or the communist nomenklatura) who purposed to transform his popularity into political power by urging his colleagues or comrades to opt for a semi-presidential system with directly elected president. In this case these political leaders wanted to be the first directly elected presidents of the new democratic republic (like in Poland or in Romania). On the other hand, the traditionally close relations of the Polish and Romanian culture to the French one is also a main factor in that these countries opted for a stronger president in their constitutional system.

It is also true however, that judicialization of politics is necessarily accompanied by the politicization of law and courts, which is only the other side of the same coin (Ferejohn 2002). Since selection and election of judges of constitutional courts are highly politicized processes, constitutional courts became a playfield for politicians: they wanted to have their own reliable judges on the benches. Charges against courts that they have entered the field of politics and became positive legislators and/or constrained the room for manoeuvre of the legislators became more and more frequent in CEE from the early 2000s (Pócza 2019). While at the beginning there were some countries (once again Romania and Poland) in which the constitution made an overrule of courts' decisions by legislators possible, constitutional amendments adopted in the late nineties and early 2000's established almost everywhere the strong form of judicial review (Kuti 2019; Wolek 2019). Today constitutional courts have the final word even in Poland and Romania on whether a legal regulation is in harmony with the constitution or not. Since almost every political question might be easily transformed into a question of constitutionality, politicians were more and more keen to use the instrument of judicial or constitutional review which undoubtedly contributed to the judicialization of politics and politicization of courts. This trend of adopting strong forms of judicial review is certainly a success story for German Federal Constitutional Court (*Bundesverfassunsggericht*) which served as an attractive model for the CEE countries' constitutionalism (Lembcke 2019).

Nevertheless, it must be emphasized that this shift of the main political battlefield from executive-legislative relations to judicial-legislative relations in the CEE region coincided with the global spread of judicial review and the shift of power struggles from its traditional dimensions to its new dimension of judicial-legislative relations (Ginsburg 2008). In the last four decades constitutional courts have been established almost everywhere in the world where democratization processes started. Beyond some evident exceptions (like the Netherlands or some Scandinavian countries) judicial review became a more important part of political struggles even in established democracies like France or the UK (de Vissier 2014). Some authors argue that these explicit or implicit constitutional changes lead to what they call juristocracy (Hirschl 2004): judges have nowadays mainly the last word in almost all important political issues even in established democracies which were originally highly aversive towards judicial supremacy (see the Supreme Court case Miller v Brexiters in the UK).

Now the question emerges whether this type of constitutionalism based on a strong form of judicial review and judicial supremacy should prevail on the national, European or even global level, or are there any alternative forms of constitutionalism to be considered for adoption? Parliamentary supremacy, judicial supremacy and constitutional dialogue, legal and political constitutionalism, Commonwealth and Scandinavian model of judicial review, popular and participatory constitutionalism are the keywords to be discussed in the next chapter which is devoted to the variations of the current forms of constitutionalism in Europe.

4. European models of constitutionalism

4.1. Legal and political constitutionalism

Strong form of judicial review and judicial supremacy is one of the most important characteristics of the legal model of constitutionalism quite widespread in the world (Sajó and Uitz 2017). Since this model has been adopted almost in every CEE country after the democratic transformation processes, it became the dominant model in Europe in the last decade of the 20th

century (Sadurksi 2014). As mentioned above this model relies heavily on the idea that the final word in political conflicts should be said by constitutional courts and not by governments, parliaments or by the people.[2] Human rights have a special role in this model of constitutionalism which is keen to limit majority decision-making if it violates individual rights. Since human rights should prevail even over democratic majority decisions this model of constitutionalism has been frequently labelled as counter-majoritarian in its underlying philosophy (Bellamy 2007). Constitutional courts are the bulwarks of individual rights thus every political decision should be reviewed by judges who consider whether the legal regulations adopted by the legislators or issued by the executive are in harmony with the constitution or not. This is why several authors argue that the legal model of constitutionalism realizes judicial supremacy and subordinate political decision-making to judicial review (Waldron 2006).

Critiques of legal constitutionalism argue that the global spread of judicial review and judicial supremacy cause democratic deficit, advance depoliticization and juridification of politics, consequently judicial review of legislative acts should be significantly restricted on condition that the democracy is consolidated, political actors respect minorities' rights and the basic rules of the political game (Waldron 2016). Given that these conditions are fulfilled, the fundamental principle of political constitutionalism argues that directly accountable politicians should decide on the most important political issues, not judges. Democratic procedures should prevail over judicial decision making which moves our democracy closer to an aristocracy (juristocracy). Authors defending political constitutionalism argue that political conflicts could not be resolved by judicial decision making since reasonable disagreement is an inevitable concomitance of social life (Bellamy 2007). Consensus on the most salient social and political issues is not achievable, consequently courts' unilateral decisions produce frustration in those who lost the case before the court. Debates among judges, majoritaírian decision-making in the court and dissenting opinions unveil the ineliminable prevalence of social conflicts (even within courts), thus reasonable disagreement is the dominant form of social coexistence. Consequently, not judges but politicians should have the final word on the most important political issues. Instead of judicial supremacy, parliamentary supremacy should characterize the constitutional system of a consolidated democracy.

4.2. The Commonwealth and the Scandinavian model of constitutionalism

Between the two poles of judicial and parliamentary supremacy there are some other models which tries to make a balance and create incentives for constitutional dialogue between constitutional courts and legislators. Although there are significant differences between the models discussed below, the North European models of constitutionalism has also a common denominator: courts have the competence to review legislative acts, but they are not entitled to annul them.

[2] Of course, it should be stressed that courts speak the language of constitutionalism and even if judges have policy or party preferences, even if decision-making in judicial bodies might be an internal strategic interaction among judges or external strategic interaction with other political bodies, courts have to insist on the question whether the legal regulation under review is in harmony with the constitution or not. This causes some constraint on judges concerning their preferences but at the end of the day creative interpretation might eliminate the most important obstacles judges have to face in promoting their own policy or party preferences. Strategic decision-making, which presumes and takes the reactions from other judges or political actors (or even the public opinion) into account, means that judges are part of the political system which might influence their decisions.

In the Northern region of Europe centralized or decentralized judicial review of legislations does not form an organic part of the constitutional tradition and has never been a major issue of politics. Fundamental rights were protected rather by commissioners of the parliament, also known as ombudsman. In some countries (like in Finland until 2000 or in the Netherlands up until now) the constitution explicitly prohibits judicial review of legislative acts, in other countries (like in the UK) parliamentary supremacy simply prevailed (until the end of the 20th century) without pressing incentives for formally introducing judicial supremacy. In-between the British and the Finnish/Dutch tradition there are some other Scandinavian countries where the constitution does not explicitly prohibit judicial review, but courts empowered themselves to review legislation, while they showed explicit deference and self-restraint at the same time.

As for the Commonwealth model of constitutionalism there are three options which challenges the common differentiation between political and judicial supremacy (Gardbaum 2012). In New Zealand, courts are not entitled to declare any legislative acts unconstitutional, they might, however, interpret the laws in conformity with the (unwritten or uncodified) constitution. In the UK, the Supreme Court has the competence to review legislation and it is entitled to declare a legislative act as incompatible with the Human Rights Act (1998) but it can't annul any legislative acts. What happens after a declaration of incompatibility with the HRA, whether the act will be amended or not, depends on the legislator. Nevertheless, some argue that ten years after the adoption of the HRA and establishment of a separate Supreme Court of the UK (separated from the House of Lords) there was no a single example for ignoring the declaration of incompatibility, i.e. the British parliament has always changed the law which was found incompatible with the HRA by the Supreme Court. Other scholars argue that it is simply an emerging constitutional convention that parliament should respect the SC decisions, but formally the parliament still can act as it will and can still ignore the decision of the SC (Kavanagh 2009). A third sub-model of the Commonwealth constitutionalism is the strongest one: the Supreme Court of Canada can annul any legislative acts, the Canadian parliament can, however, with a super-majority overrule the Supreme Court's decisions. Nevertheless, the famous "notwithstanding clause", i.e. Section 33 of the Canadian Charter of Rights and Freedoms, has never been used until now. Consequently, several authors argue that an unwritten constitutional convention has emerged, and the Canadian model moved close to the model of legal constitutionalism with its judicial supremacy.

The Scandinavian courts' right to review legislative acts has never been included into the constitutions of these countries. Nevertheless, courts in Denmark, Norway and Sweden declared quite early (some even in the late 19th century) that they are entitled to review legislative acts from the point of view of its constitutionality (Hirschl 2011; Győrfi 2016). These acts of self-empowerment (similar to the case of Marbury vs. Madison in the US in 1803) were, however, not followed by judicial activism, i.e. judges and courts in these countries showed profound deference towards the legislators by presuming that the legislator acts in good faith and does not intend to violate fundamental rights of the citizens. Self-empowerment combined with self-restraint is the main characteristics of the decentralized Scandinavian model of judicial review. To sum up: we could argue that constitutions of these Northern European countries clearly take a stand on the question of judicial or parliamentary supremacy, the political practice, however, shows that written norms are several times overruled by unwritten conventions. Consequently, there is a quite wide room for manoeuvre for both the judiciary and the parliament in accepting or denying one another decisions. The interaction between the two branches is more indeterminate then in other models of constitutionalism. This kind of

constitutional dialogue is currently very popular among scholars but perhaps less attractive for politicians and judges of the European countries.

4.3. Participatory and deliberative constitutionalism

Beyond the legal and political model of constitutionalism, and beyond the Commonwealth and Scandinavian models, there are some further models which more or less denies that judges and court had a special role in resolving political conflicts. These movements argue that popular participation and public deliberations are the best instruments to resolve social and political conflicts. Judges might have their own views, but the centre of political decision-making should be shifted from judicial-legislative relations towards a *populus*-centered deliberative form of decision-making (Reuchamps 2016). Consequently, scholars and movements promoting partcipators and deliberative constitution-making and constitutional changes are more sceptical of judicial review and judicial supremacy (Blokker 2018). It is rather the supremacy of the people which would be the most desirable form of constitutionalism according to these scholars. There is an emerging literature on participatory and deliberative constitution making, and also several examples of practical realization of deliberative and popular constitutionalism are discernible – mainly in Western European countries. Deliberation and participation in constitutional changes is perhaps the trendiest research area while it seems to be also promising for decision makers if they really want to regain public trust in politics and political institutions. Participatory constitutionalism is not unknown in CEE but also not the dominant form of constitutionalism (Blokker 2013). Democratic transformation in CEE region was mainly elit-driven and not very inclusive, although some referendums held in the region seemingly contradict to this generalization. Deliberative constitutionalism (on the national level) seems to be at the moment rather a pipe-dream of scholars, although several experiments have been conducted on sub-national level (Smith and Setälä 2018). These experiments concluded in mixed results: some has been promising while others disclosed the drawbacks of deliberative and participatory constitutional changes. It is also well known that failure of the European constitution project was at least partly caused by the referenda in the Netherlands and France in 2005. Consequently, popular and deliberative constitutionalism face several challenges not only in CEE but also in Western Europe. Whether these obstacles can be removed, and if they can, is participatory and deliberative constitutionalism a desirable project, will be the question of the next future.

5. Models of European constitutionalism

Defeats of the project of a European constitution caused by the realization of the idea of participatory constitutionalism might have revealed only the top of the iceberg as far as the project of a European constitutionalism is concerned. The models of constitutionalism discussed above are sometimes in sharp contrast to each other and their flexibility concerning the European integration processes are highly different. It is perhaps less obvious and well known that the project of the European integration process is closely connected to one type of constitutionalism, i.e. to the model of legal constitutionalism. Nowadays several scholarly works argue that the real engine of the European integration was not the European Commission, neither the European Council nor the European Parliament, but the European Court of Justice (Stone Sweet 2004; Vauchez 2015). If we accept this interpretation of European integration processes, we have to consider whether the legal constitutionalism with the judicial supremacy of the European Court of Justice, the European Court of Human Right (and in some respects

the judicial supremacy of the European Commission) is acceptable or desirable for the member states or not? We should be are aware of the consequences of the legal model of constitutionalism like judicialization of politics and politicization of courts but also consider how much weight should be placed on the "shoulders" of European (and national) courts. Shifting centre of political decision-making will have certainly consequences which we have to be aware. Analysis of patterns of constitutionalism on the national level might assists in preparing for the positive and negative consequences of judicialization of politics on the European level which seems to be today the dominant form of constitutionalisation of Europe.

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