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Armin von Bogdandy and Pál Sonnevend (eds.): *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*

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Constitutional crises witnessed in Hungary and Romania in the last few years have deeply shaken European political settings, calling into the question the European Union's ability to safeguard its own set of fundamental values and principles, and to prevent the proverbial democratic backsliding of member states – an issue which becomes quite thorny especially when looking at the role the presumption of compliance with EU fundamental rights plays within the EU common market, or at long present accusations of double standards in evaluation of democracy and human rights protection in the old member states as opposed to candidate countries.

Von Bogdandy's publication therefore steps into a very lively, yet still surprisingly under-researched problematic. Only on 27 July 2016, European Commission published new opinion on situation in Poland, which is now under the surveillance, possibly as the first country where the new framework for safeguarding the rule of law, introduced in March 2014 in reaction to Hungarian crisis, can be implemented. While the scholarship covers theoretical aspects of the rule of law and its emergence within the European communities, no comprehensive empirical work on democratic backsliding and effectiveness of different EU mechanisms has been done so far.

A collective publication *Constitutional Crisis in the European Constitutional Area* builds on examples of constitutional crises in Hungary and Romania, providing both analysis of the internal development and external reactions. Authors set out to bring suggestions how to deal with different shortcomings of European

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Institutions – be it the lack of appropriate competences to enforce their position or the absence of relevant theoretical framework and common understanding of concepts of democracy and rule of law.

The edited collection is divided into two main sections: The first one, *Setting the Scene,* introduces key constitutional problems and background of constitutional crises in Hungary (chapters 1–4) and Romania (chapters 5 and 6). The second section, *Instruments for Maintaining Constitutionalism in Europe,* concentrates on systemic deficiencies in the rule of law within the EU law framework (chapters 7–8), possible effect and impact of the European Convention on Human Rights (chapters 9–11), and finally, introduces theories of limits of the constitution-making power (chapters 12–14). The conclusion, apart from summarizing the findings, offers suggestions how to deal with aforementioned problems.

Introduction to Hungarian and Romanian Constitutional Crises

László Sólyom opens the book with recollection of Hungarian constitutional development embedded in various external impulses. The Hungarian Constitutional Court enjoyed particularly strong position among Central and Eastern European (hereinafter also CEE) courts, reviving the Kelsenian model with the system of *actio popularis* –abstract constitutional review. However, being seen mostly as a demonstration of power towards the Parliament and a channel for direct democracy, this competence was often hugely criticized by domestic politicians. It is no wonder that *actio popularis* was one of the first competences targeted during the 2012 Constitutional reform, which Sólyom describes as a decline in constitutional culture and abandonment of principles developed during the last 20 years (p. 16). It is important to note, though, that this decline did not dwell in material content of newly introduced provisions, but in a more subtle procedural steps and overall change of societal and political attitudes. New Constitution severely abuses the principle of separation of powers and system of checks and balances. Many good novelties, as reform of judicial administration, were lost in efforts to strengthen parliamentary sovereignty on the cost of elimination of any of its counterweights. Sólyom's analysis implicitly draws on strategic actor theories tying level of independence and endowment with competences of constitutional courts to electoral competition and changes in electoral map (Ginsburgh 2003, Ramseyer 1994, Popova 2013) - although with an interesting twist, as it seems that electoral map and power position might continue to influence the existence of Constitutional Courts past the point of their establishment and competence setting. His conclusion, though, is not a pessimistic one as he puts particularly strong emphasis on historical embeddedness of Hungarian constitutionalism in international law and European constitutional culture, believing that these roots and omnipresence of

Constitutional Court's jurisprudence in society will help the Court endure recent political attacks (p. 31).

Chapters 2 to 4 seek to introduce in more detail all problems of constitutional amendment. In Chapter 2, "The Constitution as in Instrument of Everyday Party Politics," Pál Sonnevend, András Jakab, and Lóránt Csink point out that the core problem of the new Constitution drawing both internal and international criticism lies not with the Basic Law itself, as its content is not completely dissimilar to other European constitutions, but with the procedural steps leading to its enactment. The preparatory work was short and non-transparent, excluding political opposition and societal actors both from the debate and decision making process – it is worth pointing out that Basic Law was, in the end, approved solely by votes of the governmental party. It could be contested that revolutionary constitutions in other CEE countries were enacted in a very similar pattern, however, with a very different source of legitimacy, and under the pressure of an extraordinary historical moment.

Apart from several substantial questions as protection of minorities, conception of marriage and family life, or the right to life, the most problematic element is actually hidden in transitional provisions and subsequent constitutional amendments, effectively limiting checks and balances and diminishing the independence of judicial power. Many procedural, institutional, and personal changes were introduced through amendments of the Basic Law, limiting broader discussion on the matters. Authors here briefly comment on personnel and institutional changes in judiciary: While the elimination of Constitutional Court's competences attracted most of the attention, government interfered strongly also with general judiciary, curtailing the mandate of the chief justice of former Supreme Court (a case which resulted in violation of European Convention on Human Rights in Strasbourg)[2] or appointing Fidesz proponents and people close to Orbán to crucial public service positions. Under the pretence of purifying the judiciary of judges who had been in office under the communist regime, the retirement age was lowered across the board, which permitted the government to put forward its own nominees for most of the senior positions. This process was further accelerated by institutional reform of judicial administration: Previously often criticised judicial council was substituted by a new organ, National Judicial Office with strong personal and disciplinary competences, however, once again occupied by people close to Orbán. While the authors were fairly optimistic about a possibility of reversal of introduced changes, claiming that "it does not seem that there are ideological motives behind the changes to the constitutional system" with individual elements being too eclectic and contradictory (p. 108), the latest development showed that far reaching reforms of

[2] European Court of Human Rights, Baka v Hungary [2016], Grand Chamber, Judgment of 23 June 2016, App. No. 20261/12.

personnel and administrative character shifted most of the checks and balances past the point of no return. A good example might be the judgment of the Court of Justice of the European Union regarding the age discrimination of judges, which didn't have any other but declaratory effect (retired judges couldn't return to their previous position which were already occupied at the time the judgment was delivered).[3]

Kim Lane Scheppele (Chapter 3, "Understanding Hungary's Constitutional Revolution") argues that this development was fostered by long-term discontent of citizens, helping extreme right and nationalistic parties to raise to power, in combination with very week institutional checks on the constitution amendment process. Scheppele offers strikingly open and sharp critique, warning international community to take situation in Hungary, which is on the verge of tyranny, seriously. "[Fidesz] has gathered all of the powers of the Hungarian government into its own hands, without checks from any other political quarter and without any limits on what it can do" (p. 114). The core of the chapter focuses on the fourth Amendment banning the Constitutional Court from reviewing constitutional amendments for substantive conflicts with constitutional principles. Author criticised legislatively introduced nullification of Court's previous case law. It's worth noting that while it was not nullification per se, the executive power did render most of its previous jurisprudence ineffective, claiming it cannot be used to assess the principles and norms introduced by the new Basic Law. Such an inference into the competences of the Court, effectively limiting its interpretative power, is highly atypical.

Finally, the last aspect of Hungarian controversial reforms – new Media Law – is analysed in depth by Gábor Polyák in Chapter 4 "Context, Rules and Praxis of the New Hungarian Media Laws. How Does the Media Law affect the Structure and Functioning of Publicity", which describes the constitutional underpinnings of the media regulations and chilling effect of newly introduced restrictions and structural revisions on the pluralism of national media. Overall, first four chapters bring very good and critical assessment of changes happening in Hungarian society, introducing them in wider context of national constitutional setting.

Unfortunately, the same cannot be said for the second part of the first section, as chapters devoted to Romanian structural and constitutional changes are quite brief, in parts even missing deeper contextual analysis considering the width and depth of individual problems. Bogdan Iancu (Chapter 5) introduces emerging crisis and power struggle between executive actors. Governmental interventions, removal of speakers of both Parliament houses and Ombudsman quickly drew attention of international community, escalating with bickering

[3] Court of Justice of the European Union, C-286/12 European Commission v Hungary, 6 November 2012.

between the President and the Prime Minister in the conflict revolving around (unconstitutional) amendment of the referendum law and Constitutional Court Act. Iancu interestingly points out that while the international community, mainly represented by the Venice Commission, and the Constitutional Court both used the rhetoric of rule of law and principle of the separation of powers, the criticism lacked credibility as these concepts were not deeply embedded in Romanian society (p. 161). The Constitutional Court has never before enjoyed particularly strong power position, rendering the expectations laid on it with imminent political crisis almost unreasonable. Cosmina Tanasoiu (Chapter 6) continues with shifting the focus on EU conditionality after the Romanian accession, reviewing main rule of law developments between 2007 and 2012. Both authors agree in their sceptical views on Control and Verification Mechanism – and instrument introduced by the European Commission targeting specifically Romania and Bulgaria in order to be able to influence domestic reforms after the end of the accession conditionality leverage (p. 177). Tanasoiu claims that accession, paradoxically, opened up new channels and possibilities for corruption scandals, mainly in form of EU funds. Chapter then proceeds with record of implementation successes and failures and infringement procedures against Romania. However, it lacks more comprehensive review of individual mechanisms introduced by the Commission and other EU institutions in order to target the constitutional crisis.

Constitutionalism in Europe – sceptical view of Rule of Law prognoses

The second section of the book, *Instruments for maintaining Constitutionalism in Europe,* promises analysis of how European Union (and other international actors) targeted current constitutional crises and claims to focus on future prognoses, seeking the positive sector in which the EU might prove to be influential. The core issue and leitmotif of the book, the ability of European Union to address and mitigate constitutional crises and democratic backsliding of its own member states, is addressed primarily in Chapter 7 (Frank Hoffmeister, "Enforcing the EU Charter of Fundamental Rights in Member States") and Chapter 8 (Armin Von Bogdandy, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Matthias Korrmann and Maja Smrkolj, "A European Response to Doomestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine"). Both chapters draw from the unwillingness of the EU institutions to trigger the sanction mechanism established by the Article 7 TEU and limited usability of infringement proceedings when dealing with questions of democracy and national constitutional and human rights norms. Authors propose two alternative ways how to comprehend current constitutional development which is only very loosely envisaged by the Founding treaties. Frank Hoffmeister concentrates a lot

of attention on the scope of the Charter of Fundamental Rights of the European Union and its reception in national (constitutional) law – unfortunately quite mistakenly, as the character and enforceability of European Union law, Charter of Fundamental rights included, is based on the CJEU's interpretation and long established principles, not the method of national reception or transposition. Declarative effect of EU law in national Constitution has merely symbolical effect (see conf. p. 199). Nevertheless, author rightly points out that as far as Article 7(1) TEU goes, while it seems that its legal requirements for action have been met, "the cross-party majorities to trigger this heavy instrument were present in the European Parliament, not in the European Commission" (p. 233), and the European Parliament, unfortunately, does not have an active legitimacy to instigate the procedure. Hoffmeister, however, sees limited indirect and appositive effect of parliamentary discussions, questioning, and shaming tactics among the politicians.

On the contrary, Chapter 8 dismisses limited effect of all existing procedures and mechanisms and seeks to find "a third way" solution how to mitigate the gap between pre- and post-accession control. Idea of a reversed Solange principle, under which there is a presumption of compliance up until proven otherwise by a national court, was first introduced by Armin von Bogdandy and his team from Heildelberg's Max Planck Institute in 2012. Nevertheless, and authors do admit this limitation, the doctrine of reversed Solange is directly conditioned by the material scope of the Charter and EU fundamental rights conception, which is up until today too vague and obscure. Charter's application is limited to situations involving application of Union law – which, on the other hand, rarely covers processes related to constitutional development and rule of law. Authors built their argument on a very broad interpretation of Article 2 TEU (declaration of fundamental principles of EU law) implying that as Article 2 applies to any public authority, there is no reason why it should not encompass constitution-making processes and as such broing them under the reverse-Solange doctrine application scope (p. 251). Practical experience, though, does not support this argument. An excellent example was the way how individual institutions tackled Hungarian crises: The only institution openly talking about constitutional crisis and breach of fundamental EU values was the Parliament. Both Commission and Councils were quite reluctant, and most interestingly, Court of Justice, in cases which did fall under EU law application as the premature removal of judges from their functions due to changes in retirement age, was extremely careful not to use any value oriented argumentation or tackle the broader context of constitutional and rule of law crisis which in itself made the retirement so problematic. The whole case, being often used as a flagship of the EU influence, was based solely on the principle of non-discrimination.

Following chapters address the role of other European institutions. They introduce structure and competences of the European Court of Human Rights

(Chapter 9, "The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights" by Christoph Grabenwarter), position of post-communist states and most frequent cases being addressed by the ECtHR against these countries (Chapter 10, "Central and Eastern Member States of the EU and the European Convention on Human Rights" by Mahulena Hofmann), especially in transitional context, and finally Venice Commission, consultant body of Council of Europe created in order to oversee and help with constitutions-drafting processes in Central and Eastern European countries (Chapter 11, "The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania", by Joakim Nergelius).

These chapters bring easily readable and comprehensive explanation of the role of these institutions in safeguarding fundamental rights in Europe, although for a reader well oriented in the problematic of European human rights protection slightly underwhelming and anticlimactic, as the authors limit themselves mostly on descriptive observations on the system structure and competences.

European Constitutional Area – Where Next?

The final chapters of the book are devoted to theories on limits of constitutional-making power. Matthias Hartwig introduces the "science of constitutions" building upon Schmidt's conviction that a constitution is not recognized because it is legitimate, but it is legitimate because it is recognized (p. 312). Chapter, after brief recollection of constitutionalism in Kelsenian understanding, offers four standing approaches explaining the source of legitimacy: the religion, the will of people, the pure will (procedural, or power, not contextual aspect), or standards developed on the international level. This last point directly opens the door for Tilmann Altwicker's recollection of changing autonomous sphere of constitution-making, emphasizing that neither constitutional law nor constitutionalism belong any longer to *domaine reservé*, as constitutional makers need to face effect of more and more ambitious international law and international judiciary limiting their own decision-making power. Altwicker presents two scenarios of conflict of domestic constitutional norms with international conception of fundamental rights, or with standards of separation of powers and democratic governance (p. 333), which influence both substantive material scope and composition of power preset in domestic constitutions. While the conflicts are becoming more and more likely, understanding of their implications on legitimacy, and legitimacy of international actors, is very limited. Altwicker sees the nowadays popular term of constitutional pluralism as very problematic and inherently contradictory.

The book closes with Catherine Dupré's chapter on European constitutionalism and various discussions triggered by the 1992 Maastricht Treaty and so called constitutionalisation of the European Union (Chapter 14: "The Unconstitutional Constitution: A Timely Concept"). Hungarian constitutional

development renewed discussions on European constitutionalism which was in a tow of scholarship on legitimacy and democratic deficit of European institutions. "It is time," Dupré says, "to accept the possibility … that constitutions may be unconstitutional within the EU…and [to discuss] the boundaries of this idea." (p. 353). Euro-constitutionalism presumed that the only regime a constitution can create is a democracy. This conception reflects the commitment of European countries to re-establishing liberal democracy after the Second World War. Dupré warns against the paradox of democracy – a belief that it can be secured through law, and that it rests upon a set of values shared within the European community. Establishment of the Venice Commission reflected expectations what all could be achieved through constitutional law: Commission was to play a very significant role both in constitution-making and the EU accession process, by evaluating the progress of CEE candidate states. Dupré considers it to be a clear misconception and misunderstanding to rely on the law as on a tool strong and sufficient enough to build strong democracy. Admittedly, this is a very fitting ending to a publication targeting European reactions towards imminent constitutional crises and democratic backsliding. As Dupré rightly points out, our standing set of beliefs precluded both political actors and academia to approach and address the events happening in Europe, to understand that not all constitutions, or their amendments, within otherwise democratic community will necessarily (and automatically) be also democratic.

The uniqueness of the reviewed collective publication is in bringing together scholars commenting on not-so-well known aspects of Hungarian and Romanian crises, uncovering the events in domestic political arena. Interestingly, authors arrive to agreement that the challenges our democracies face nowadays dwell more in procedural limits set to principle of separation of power, than material scope of values and fundamental rights. Recent development in Poland, and adequate reaction of the European Commission, seems to conform to this pattern (see European Commission 2016). The urgency in the voice of the European Commission is unprecedented, although leaving a lot of place to wonder how influential soft-power tools are and what impact can they have on domestic political development. It seems that more comprehensive analysis of both hard and soft power measures of individual EU institutions is in line to fully comprehend and understand real influence and potential EU can achieve in safeguarding democracy and "European constitutional values". One needs to wonder whether it is possible to target the crises of *European constitutionalism* without addressing and clarifying the meaning of the term itself, and whether the EU would really be able to tackle the crisis of constitutionalism if it continuously fails to agree on its individual components.

References

Bogdandy, Armin von, et al. (2012): "Reverse Solange – Protecting the Essence of Fundamnetal Rights Against EU Member States." *Common Market Law Review* 49: 489-520.

European Commission (2016): Rule of Law: Commission issues recommendation to Poland. Press Release, 27 July 2016, on-line (http://europa.eu/rapid/press-release_IP-16-2643_en.htm), accessed August 20, 2016

Ginsburg, Tom (2003): *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press.

Popova, Maria (2014): *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine*. Cambridge University Press.

Ramseyer, J. Mark (1994): "The puzzling (in)dependence of courts: a comparative approach." *Journal of Legal Studies,* 23: 721-47. DOI: 10.1086/467943