

Constitutional Challenges within the EU and Beyond

Central European University
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Organized by
CoPolis Project, Department of Sociology and Social Research, University of
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Central European University, Department of Legal Studies/Political Science,
Hungary

Outline

Constitutionalism in Europe is in turmoil. This is not only because of constitutional implications and dynamics of the European integration project, but also due to important changes in the nature and role of constitutions in European societies (as well as globally) and related shifts in constitutional vocabularies. One way in which current constitutional uncertainty becomes visible is through an increase in constitutional politics, constitutional reform projects (as, for instance, in the cases of the Iceland, Ireland, Italy, Romania, the UK) and even the adoption of a novel constitution (Hungary). Francesco Palermo has written of an age of 'constitutional acceleration', that is the 'intensification of recourse to [the instrument of] revision in order to update the constitution' (Palermo 2007: 15). Ginsburg and Dixon, more in general, relate the prominence of constitutional change and constitution-making in recent times to the 'third wave of democracy' that commenced in the 1970s, and which included Southern Europe and later Central and Eastern Europe, but in a way, in particular from the 1990s onwards, also touched the constitutional design of 'established' democratic states (Ginsburg and Dixon 2011: 3). Constitutional dynamics are thus not restricted to new democracies in the making, but also involve established democratic regimes.

The main theme of the conference are the challenges that constitutional democracies in and also beyond Europe face in current times. The first two panels will explore various constitutional reform projects as well as the tendency towards wider civic participation in such reform. The third panel will specifically focus on the relatively new constitutions in Central and Eastern Europe and the particular challenges these regimes face. The fourth panel will discuss distinct challenges to constitutionalism – referring also to (North-)African realities -

such as the relation between constitutions and religion, constitutions and ethnic diversity, and plural constitutional regimes.

Programme

9:30 Opening: Renáta Uitz, Department of Legal Studies, CEU

9:40 **Keynote Speaker:** János Kis, Department of Philosophy/Political Science, CEU

10:15 1st Panel – **Constitutional reforms**

Chair: Renáta Uitz, Department of Legal Studies/Political Science, CEU

Speakers:

„The Blair Government and Constitutional Reform: A Tempest in a Teapot?”

Cristina Parau, CoPolis project, University of Trento

„Can the Constitution Stand on its Own Feet? Constitutional Tinkering in post-1990 Italy”

Paul Blokker, CoPolis project, University of Trento

11:15 Break

11:45 2nd Panel – **Participatory constitutionalism**

Chair: Zoltán Miklósi, Political Science Department, CEU

Speakers:

„New Constitutions as a Response to Economic and Political Crises – An Icelandic Perspective”

Baldvin Thor Bergsson, CoPolis project, University of Trento

„Ireland’s Constitutional Convention: an experiment in representation”

Jane Suiter, Dublin City University

12:45 Lunch

14:30 3rd Panel – **Constitutional difficulties in CEE countries**

Chair: András Bozóki, Department of Political Science, CEU

Speakers:

„Constitutional Revision in Romania. Post-Accession Pluralism in Action”
Bogdan Iancu, Political Science Department, University of Bucharest

“The Impact of Populism on Constitutionalism: A Bulgarian Case Study”
Daniel Smilov, Political Science Department, University of Sofia

“Constitutional Continuity Disrupted”
Kriszta Kovács, CoPolis project, University of Trento

16:00 Break

16:30 4th Panel – **Distinct challenges to constitutionalism**

Chair: Gábor Attila Tóth, Constitutional Law Department, University of Debrecen

Speakers:

“Religious Rights and Constitutionalism. An Egyptian-Hungarian Comparison”
Gábor Halmai, Visiting Professor, Princeton University

“Provincializing Constitutional Pluralism? The Case (and the Spectre) of the Former Yugoslavia”
Zoran Oklopčič, Associate Professor, Department of Law and Legal Studies, Carleton University

“Ethnic Conflicts and Autocratic Executives: The Gordian Knot Defining African Constitutionalism”
Gedion T. Hessebon, Department of Legal Studies/Political Science, CEU

18:00 Concluding observations: Renáta Uitz, Paul Blokker

Abstracts

The Blair Government and Constitutional Reform: A Tempest in a Teapot?

Cristina Parau, CoPolis project, University of Trento

The Labour Government of PM Tony Blair enacted a hotch-potch of constitutional reforms which many have nonetheless come to regard as a historical watershed, ranging from devolution to the Human Rights Act 1998 to the purge of hereditary peers from the House of Lords to the creation of a Supreme Court and the emasculation of the Lord Chancellor's role in judicial appointments. This paper will argue that these seemingly arbitrary changes evidence an abortive attempt at bringing in a written constitution. This agenda had been promoted by Charter 88 after the Labour Party lost to Margaret Thatcher for the third time in the late 1980s. The plan was to put through their agenda in tandem with the Liberal Democrats. The actual changes turned out haphazardly, with unforeseen political complications, a raft of unintended consequences and, ultimately, largely ineffectual reforms. Many of the agenda items which supporters on the Left had discursively constructed as critical constitutional changes eventuated under the continuing framework of parliamentary sovereignty and therefore, unlike a written constitution, may be repealed by Parliament at will.

Can the Constitution Stand on its Own Feet? Constitutional Tinkering in post-1990 Italy

Paul Blokker, CoPolis project, University of Trento

The Italian Constitution of 1948 is widely understood as a historical compromise between three political forces: the socialists, the communists, and the Christian Democrats. These political forces formed the main political parties in the post-'48 Italian political landscape, constituted a veritable 'partitocrazia', and provided the political basis for the Constitution. With the profound rupture in the early 1990s, constituted by a widespread corruption scandal (*tangentopoli*),

the traditional parties largely disappeared from the Italian political scene, and with them the undiscussed veneration of the 1948 Constitution and the convention of a consensualist approach to the Constitution. Since the 1990s, various attempts at wholesale reform of the Constitution have emerged (1993, 1997, 2006, 2013), but all of these have largely resulted in failure. The paper discusses these different attempts and ask the question whether the societal and political hold of the Italian Constitution has diminished in the post-1990 era, whether the idea of a significant reform is related to real historical necessities, and whether the Italian model of a rigid constitution has eroded.

New Constitutions as a Response to Economic and Political Crises – An Icelandic Perspective

Baldvin Thor Bergsson, CoPolis project, University of Trento

In 2011 a popularly elected Constitutional Council submitted a draft of a new constitution to the Icelandic parliament (Althingi). Despite a referendum where a substantial majority supported the draft it seems unlikely that it will serve as the foundation for a new constitution. While the process was seen as an attempt to reconcile the nation and the political establishment after the economic and political crisis in 2008, it has not produces the intended results. Trust towards politicians has never been lower and before the general elections in 2013 the fragmentation of the electorate became obvious when several new parties were founded.

This paper will examine the proceedings in Iceland from different viewpoints that have been used to explain why the drive for a new constitution ended in a deadlock. The first is a look at the process itself, and the decision of the Constitutional Council to write a complete constitution instead of focusing on improving the old one. While it would be simplistic to say that limited time or the decision to write a completely new constitution were the main reasons for the impasse they certainly played their part. The second will examine the political parties and the way in which political bickering between government and opposition hindered the process. While internal politics might be seen as having limited explanatory value in a comparative sense, they still serve as a guide to possible events following economic crises. The ‘pots and pans revolution’ in Iceland did not produce a new system of government and former ruling parties have returned to government, which might be seen as a defeat by the movement campaigning for change. The Icelandic case can therefore serve as an example of how the political elite can both counter and subdue demands by

the public following a major crisis.

The drive for a new constitution in Iceland exposes the triangular dynamic between democracy, civil society, and constitutions. The 1944 constitution was for many an indicator of a failed political system, serving mainly the political elite at the cost of democracy and civil society. It will be argued that unless a new balance is found in Iceland, the debate about the political system and the constitution will continue, widening further the gap between the opposing factions. The paper uses data from both semi-structured qualitative interviews with several people involved in the process in Iceland, and quantitative data from The Icelandic National Election Study (ICENES) which shows the attitude of both politicians and the public towards constitutional politics in Iceland.

Ireland's Constitutional Convention: an Experiment in Representation

Jane Suiter, Dublin City University

The worst economic crisis in Irish history has helped to propel political reform towards the top of the political agenda. The current coalition government has already implemented a series of reforms and in late 2012 the government established the Irish constitutional convention tasked with considering a number of specific areas for reform. Ireland's Convention on the Constitution, can be described as 'sui generis' as it brings together both 'ordinary' citizens and political representatives in a deliberative mini-public to make recommendations on a series of constitutional issues ranging from reducing the voting age to same sex marriage and reforming government parliament relations. This is the first Convention of its type to include the two on the equal basis. This paper will examine the dynamics and effectiveness of this unusual combination in representation.

Constitutional Revision in Romania. Post-Accession Pluralism in Action

Bogdan Iancu, Political Science Department, University of Bucharest

Due to several idiosyncratic features of the Romanian transition (violent overthrow of the regime, large-scale, unchallenged perpetuation of communist elites), the Constitution of 1991 was marked by a mixture of entrenched group preferences and the ad-hoc compilation of Western institutions, in the absence of

a normative foundation questioning of the system as such or of overall institutional coherence.

The structural deficiencies of the post-communist foundations –for instance, the lack of coordination within or among the branches of power- were obfuscated for a long time by post-communist political consolidation and rule of law instrumentalism. In 2003, the needs of EU political conditionality triggered a large-scale upheaval of the fundamental law but, due to the nature of fast-track EU accession and incoherent monitoring, this more recent wave of constitutional reform added new sets of contradictions and tensions to the preexisting shortcomings. For instance, the entire judicial system gained constitutionally entrenched autonomy, following EU Commission recommendations made in the name of “judicial independence”, whereby forms of unaccountable corporatism or hidden political influence developed as a result *within* the justice system. Likewise, the regulatory needs of EU accession, including anti-corruption policies, have for the most part generated novel incentives (e.g., a plethora of constitutionally entrenched autonomous agencies) for selective systemic adaptation, i.e., network manipulation.

These superimposed patterns of (post-communist, pre-accession, post-accession) constitutionalism coalesced in a hybrid-pluralist system which evinces both pre- and post-modern features and contradictions. The current arrangement is prone to generating periodic constitutional crises, including recurrent factional attempts to revise the constitution, whereas by now the conditions for the possibility of genuine constitutional normativity are no longer imaginable.

The Impact of Populism on Constitutionalism: A Bulgarian Case Study

Daniel Smilov, Political Science Department, University of Sofia

The paper explores the effects of the rise of populism on constitutionalism in Eastern Europe through an analysis of developments in Bulgaria. Tangible impacts are detected in two dimensions. First, the rise of populist players politicizes the constitution, which inevitably undermines one essential element of constitutionalism - the rule of law and legal stability. Secondly, the rise of populism leads to a general undermining of trust in politics: the political sphere becomes populated with unpredictable players, light in terms of ideology and organizational capacity (as a rule). This calls for additional constraints on policy changes, which governments could in principle initiate. Hence the popularity of currency boards, fiscal boards, and other - constitutional in their nature -

constraints on the powers of democratically elected bodies. This has a strengthening effect on some aspects of constitutionalism (essentially, it deepens the separation of powers). The paper assesses the balance between negative and positive impacts of contemporary populism on constitutionalism.

Constitutional Continuity Disrupted

Kriszta Kovács, CoPolis project, University of Trento

In 1989 a coordinated transition went underway in Hungary. Liberal democracy replaced the communist authoritarianism. In 2010 Fidesz gained the two-thirds majority of the parliamentary seats which opened the way for constitutional changes. The governmental constitution-making reshaped the constitutional framework by adopting the Fundamental Law and its amendments. Thereby a transition away from liberal democracy went underway.

My presentation analyses these measures with the help of the concept of constitutional continuity. I will differentiate between the continuity of a legal system and a constitutional system. Under legal continuity I mean that the law and the legal relationships established thereby continue in force despite the demise of a system of government and the birth of a new one. I use the notion of constitutional continuity in a substantive sense. According to this, not only the legal system but also the basic structure of the state remains intact despite the adoption of a new constitution.

The presentation touches upon three different scholarly approaches concerning the continuity of the Hungarian constitutional system. Firstly, it illustrates the idea that although certain minor infractions of constitutional continuity occurred, the 2011 Fundamental Law did not change substantially the basic state structure and Hungary remained a democratic country under the rule of law. (constitutional continuity) Then, it goes to another view which holds that the Fundamental Law more or less followed the path of the 1989 Constitution the Fourth Amendment, however, by repealing the previous case-law of the Constitutional Court meant a major unconstitutional infraction. (partial discontinuity)

According to the liberal critics, the constitutional continuity was disrupted by the 2010 flow of modifications of the old Constitution and the Fundamental Law since they removed the checks and balances and undermined the rule of law. The recent amendments could be interpreted as further elements of the constitutional regression process. In this view the current regime cannot be seen as a completely new constitutional order, it is however disconnected the one

existing up until 2010. (constitutional discontinuity)

Religious Rights and Constitutionalism. An Egyptian-Hungarian Comparison

Gabor Halmai, Visiting Professor, Princeton University

This paper deals with the relationship between church-state relations, religious freedom and different forms of constitutionalism. The study plans to investigate the topic from both a normative/theoretical and an empirical perspective. The normative part of the paper starts with the very definition of liberal constitutionalism, and the role of religious freedom in this definition, followed by the characterization of illiberal constitutional approaches, including theocratic constitutionalism. The second part of the paper compares different national constitutional regulations and different results from the adjudication of religious rights, as well as to look at international human rights treaties together with the jurisprudence of international treaty bodies. In the empirical part, the paper uses recent case studies to analyze the role of church-state relations and religious freedom in emerging but still illiberal democracies, like the one in Egypt, as well as those backsliding to illiberal constitutionalism, like the one in Hungary, and also discusses the likelihood that these two illiberal constitutional models would spread to new sites.

Provincializing Constitutional Pluralism? The Case (and the Spectre) of the Former Yugoslavia

Zoran Oklopčič, Associate Professor, Department of Law and Legal Studies, Carleton University

Initially developed in the context of the European Union, and recently touted as one of its most inspiring theories, the idea of constitutional pluralism has already begun to travel outside of its “regional comfort zone”.

The purpose of this paper is to take constitutional pluralism and explore how its meaning, and the prescription it offers, change in the context of the EU’s periphery, such as in the former Yugoslavia. Such provincialized constitutional pluralism problematizes constitutional pluralism in the context of two complicating factors thus far not squarely addressed in the literature on the

subject. The first factor is deep national diversity that verges on, and may result in, recursive territorial fragmentation. The second complicating factor concerns the relationship between the political theater where pluralist demands occur, and their larger political environment. The proliferation of demands for nesting territorial autonomies, or even secession, are more likely to be intrusively affected by the external powers at such peripheries

Provincializing constitutional pluralism requires three theoretical interventions. First, constitutional pluralism has to be positioned against current debates in normative political theory. Constitutional pluralism should be understood, in part, as constitutional theory's response to the current state of normative political theory that thematizes national conflicts in deeply divided polities.

On the other hand, constitutional pluralism has to be situated within the field of competing approaches in constitutional theory, widely understood, that offer an alternative or undermine the project of constitutional pluralism. Within the ambit of a single paper this can only be done partially. In the paper, I address the challenge of 'radical pluralism' and the objection of pluralism's 'double monism'.

In the final part of the essay, provincialized constitutional pluralism speaks back to the 'core'. If we take the ideal of constitutional pluralism seriously, then those who fight for it ought to have political and constitutional tools at their disposal to fight for their pluralist vision at the core's sites of political decision-making, where the degree of constitutional accommodation of national pluralism is deliberated, managed, and oftentimes decided.

Ethnic Conflicts and Autocratic Executives: The Gordian Knot Defining African Constitutionalism

Gedion T. Hessebon, Legal Studies Department, CEU

Since the days of independence, the autocratic proclivities of the executive branch in most African countries, manifested in various forms of personalized dictatorships and the intense rivalry of ethnic elites to capture the state and the economic resource that the state controls have been the most intractable challenges facing constitutionalism in Africa. The political economy, the ethnic composition and the historical legacy of past regimes in many African countries create a political environment that is hostile to the consolidation of constitutional democracy. The interplay of these factors encourages the political mobilization of ethnic groups, autocratic and even violent tendencies within the polity and as a result militates against the emergence of stable constitutional democracies. In the immediate aftermath of independence, these challenges led

to the quick and unceremonious jettisoning of the democratic constitutions adopted during independence in favor of military or one party dictatorships. Since the end of the cold war, various external and internal factors has made it imperative for African states to re-institute multiparty politics and experiment with constitutional democracy. These latest experiments with constitutional democracy in Africa has also been fraught with overbearing and hegemonic executives and ethnic tensions and conflicts. Over the last two decades, many countries over the continent have been attempting to tackle these problems through carefully crafted constitutions designed to specifically address these problems. While it might be too early to confidently evaluate the success or failure of these efforts, it is high time that these efforts are noted in the comparative constitutionalism scholarship. Particularity, it is a worthwhile endeavor to investigate to what extent the attempt to respond to these challenges is defining African constitutionalism in a way that is distinct from the classic understanding of constitutionalism.
