

Contested Legitimacy

Abstract: *There is a growing demand to change the institutions and constitutional design as response to the impact of the electorate or other recently emerging movements supported mostly from various street protest actions or citizens rallies. Despite of how it may be difficult to bring about any general typology of diverse motivations, forms of manifestation and outcomes they lead to, I am inclined to believe, that their objective is to challenge the institutions. The institutions are thought to fail because they cannot fully deliver legitimacy. In other words, public pronouncement of discontent over policies is easily transferred to the common disapproval of the established institutions. And the institutions that are becoming an easy target of all the malaises, even though they had been established through free and fair elections, are becoming handy victims as a result of peace-building negotiations.*

Keywords: *political institutions; legitimacy; social protest; democracy; populism.*

I. Legitimacy and institutional change

Let us take a recent example of the French so-called *gilets jaunes mouvement*, whose name, style and French spirit of mass protest endurance may well illustrate the case. Street rallies that originally gathered protesters against the rise of the fuel price in Autumn 2018, managed, either by the force of mass participation, or gradual broadening of the demands and persistent gathering in big cities, to “invite” the President of the Republic to open a new format of political communication. This is the so-called Open Talk (*Grand débat*) with the public over issues at stake. The new design of the communication was an

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open stage for President’s public appearance that took place both outside the traditional institutional framework and established media channels, and at the same time largely covered through new techniques of mass communication. The great debate itself had several formats: debate with the mayors, debate with the young generation, debate with the academia, each of them focusing on specific subjects. This newly conceived politics of “being in touch” with the public raised considerations of the true meaning of institutionally based public debate, this is to say, on parliament’s floor. One may evoke J.S. Mill’s contribution to the thoughts on representative government principles, that the Parliament “... can produce itself in full light and challenge discussion; where every person in the country may count upon finding somebody who speaks his mind, as well or better than he could speak it himself...”¹. Finding new ways of dialogue with the public once the electoral campaigns are officially over and after the elected representatives had been maintaining their seats, is not only in the French minds. However, their recent move came to the fore with the idea of citizens’ assembly (*assemblée citoyenne*) composed of hundred

members, citizens chosen at random, whose main role would be to deliberate on popular initiatives projects (*referendum d'initiative citoyenne*), on environmental protection issues and fiscal justice.² Generally, similar trends showing the demise of the meaning of parliamentary debates could be observed in other countries as well and have specific impact not only on the national but as well as on the EU level. Let us just refer to the European parliamentary campaign, that reported ideas and intentions to strengthen direct legislative initiative in EU or the right to hold European referendum. The question related to the above introduction, is whether the constitutional framework mostly brought on the wave of revival of neoliberalism that has been adopted in most of the East European countries facilitates and makes it easier to reconcile emerging political conflicts taking place both within the institutions as well as outside of them or whether there is high time to bring about a new concept for constitutional order.

Why do I especially stress on constitutional approach and look at possible solutions through the lenses and words of lawyers? This is because there is a strong linkage between the way we think of constitution as a social contract, – as a political convention–, and the way we look at the principle of rule of law. The theory of constitutionalism leads us to believe that there cannot be any contradiction between the spirit of the constitution and the rule of law principle. Both offer ways of how to handle conflicts according to the agreed procedures and full respect of minority and citizens' rights. However, the understanding of what is and what is not in compliance with the constitution, has usually more than one solution, and therefore it leads us to follow and observe in whose hands the constitution is. This is to say, who are the actors involved and what is the difference between them when claiming they act rightly and according to the constitution.

The first mentioned are likely to be the citizens or their representatives (as institutionalised in the Congress, in the Convention or in the Parliament), among the second group are justices (as institutionalised in the Supreme Court or in the Constitutional Court). The question then is the following: Is there any new understanding of legitimacy? Are the rules that use democratic control of the “established political elite” (*classe politique*) too inefficient, so that new paths and procedures are to be introduced? Is this a failure of the rules and constitutions that we having been thinking to be well established? Is it a failure of the political practice that does produce and absorb partyless politics that contradicts the working of the constitutional institutions such as parliament? Shall we blame those who despite being in office for long time and serving several terms in office, adapt the constitution to purposes unheard of any time before?

Legitimacy itself has been many times taken as an indicator for measuring the trustworthiness of the institutions and as the driving force for testing their capacity for meeting peoples' expectations. This applies not only to the elected institutions (parliaments, presidents) but also to those that despite of not being elected, are (or shall be) under a thorough watch of the elected bodies (justices of the constitutional courts, members of the cabinet (government), by government or by president nominated figures. Legitimacy is thought missing at several different settings: either in international institutions, or within national states, not to mention within the EU framework. What is at the core of the critique of international institutions as for the legitimacy is concerned, is the lack of the representativeness, lack of interest in the developing countries and lack of empathy for their citizens' hard everyday life. Could we transpose the discourse on the deficit of legitimacy from the international institutions to the EU level? Or is there a need for a different approach in order to handle the overwhelming perception of distrust to the institutions?

Tobias Lenz and Lora Anne Viola have worked out a cognitive approach to discuss the linkage between legitimacy and institutional change.³ Out of their analysis several interesting and inspiring observations came out: 1) that “*legitimacy challenges in one organisation might have repercussions for the legitimacy of other, related organisations*” and that “*legitimacy dynamics are not independent across different organisations, but are in fact interdependent*”, 2) that since legitimacy is something that is perceived, then legitimacy judgments are formed according to some rules developed by psychology of perception, 3) that following this, legitimacy judgments rely rather on pre-existing beliefs that tend to be replicated, that contestation leads to organisational change when highly politicised, and that legitimacy crisis tend to produce familiar institutional designs (Lenz, Viola: 957).

Let us think of this cognitive approach to explore how to look at the new factors that possibly cause the demise of the legitimacy of the national state institutions as well as of the EU institutions. Although both levels are separated in the context of the legitimacy perception, they are likely interdependent on the consequences. Let us take the perceived need for institutional change on the national level that might be replicated on the EU level. Let us think of potential dangers for diverging perceptions and views on what the principles of rule of law consist of.

II. Does the phenomenon of partylessness challenge the institutions?

The widespread perception that parties on their own do create unfounded parallel to the constitutional institutions that are being as the consequence hollowed out of any decision power and are being just empty nut shells, gave rise to the movements whose manifesto poses on the moralistic criticism of politics. As Pribán⁴ puts it: moralistic criticism of politics, is toothless and tends to surface in calls for parties of “fair people”. And further on reminds, that “fairness is a political prerequisite, not a manifesto” (Pribán:196).

The moralistic approach as presented by leaders as single issue platform, makes it hard to cross the bridge when MPs take the vote on nominees running for different offices. The challenge does not lie in the criticism itself but in the only focus on the issue that narrows the space for negotiations between factions and supports “soloist” actions of the MPs. Among them certainly pieces of legislation or amendments to the bills introduced by individual MPs. The role of the MPs (and the senators) are perceived to be in their own hands irrespective of the nature of the parliament as body whose strength is in the quality of being a collective actor. Parliamentary parties (parliamentary factions) are too weak to fulfil their presumed role, this is to aggregate votes and support parties’ policy strategies. The debate is rather a communication from the floor with messages addressed to the public at large than a parliamentary speech, full and dense of arguments to the point of the agenda. One would suggest that this can possibly strengthen the communication role the parliament plays, but in fact more often it distracts its regular legislative or other parliamentary agenda.

The weakening of the impact that parties have on key issues, is another *malaise*. As perceived by Czechs, parties that present better image and attract voters by smart political marketing are those who appear in last second before elections and as new born babies raise lot of hopes in the future. Suffices to mention the main findings of the survey carried out and published in 2016. Among reasons that cause fears, the Czech respondents listed the inability of political representatives to resolve key national problems (66%)⁵. This largely shared feeling

that parties are not worth of any confidence, explains why it is getting easy to attract votes on single issues rather than on ideological lines and long lasting life experience. In this moment there is no need to go into the level of congruency of the respondents opinions, but interestingly enough, the majority of Czechs do not feel wellbeing despite the country relative economic prosperity. Moreover, the Czechs, despite of perceiving that welfare system does not cover their elementary needs, in fact do prefer freedom to equality and support centre-right leaders to centre-left parties. This lack of congruence in the attitudes likely explains the voters' volatility who become an easy target for newly emerging groupings or movements. The newly emerging like-to-be parties easily come to the public fore (due to the very open legislation) and in case of getting seats (if only few), get established as parties in the parliament profiting from the acquired status of a parliamentary faction. The weakening of the parties calls for stronger political leadership. This leadership stems from outside the parliament, and sometimes even outside any institution. However, the present examples are not isolated as a political phenomenon in one country. To some extent we find different issues, different forms and various institutional settings in EU countries but the tendencies which as a result challenge the institutional order in place and shake the established rules, may appear similar.

III. Does the challenge lead to new rules and to the new institutional order?

Firstly, let us look at channels through which the "populism" comes "on the stage". Among them are direct actions, referenda, manifestations, gathering and rallies, petition claims. By some, the recent use of direct democracy in Europe raise concerns about the purpose, such channels of peoples' feelings (not to say intentionally "will") may serve. *Expressis verbis* the debate was worked out on referenda and their capacity to influence the constitutional framework. From the point of view of the purpose, they were considered populist, illiberal, abusive or inappropriate or unfitted to be firmly embedded in democratic constitution. Broadly illustrated by Bogdan Iancu and Mathias Revon⁶, both authors make us aware that referenda on national level do have influence on public opinion in the whole region. Comparing each other's experience warns us of potential risks when calling voters to vote on referendum to often or on issues that are hard to solve in manichean way. Yes/No vote as we are witnessing today does not give the final answer for the conflict at question. Referenda on secession certainly even if unsuccessful do claim the change of institutional framework. Both cases in Catalonia and Scotland are the good examples.

Referenda may (or not) be channelling populism. Their meaning is not primarily to incite anti-institutional feelings. However, in the current context and the tendency to give way weak political parties and strong leaders of small groupings, the populism may be very well present at any electoral campaign including the presidential ones. What makes today difference is that petitions or street actions may in fact have the same effect as recall. The question then raises, whether elections do matter, if their result may consequently have the potential to scrutinise those who have been installed properly and according to the constitution.

Secondly, we may draw attention to the Courts (Supreme Courts or Constitutional Courts) as decision makers who may change and redirect the concept of the constitutional order. There might be three examples to illustrate different situations: The Italian case "Italicum", the British case of "Brexit" and the Czech case "Melèak".

The Italian case illustrates that the Court ruled on the electoral system to both chambers of the Parliament, according to the “popular will as expressed in the referendum”⁷. As described in the quoted source the institution which was targeted was the Parliament who was struck and “defeated by the people and overcome by judicial activism”. The judicial activism is interpreted in this case as the newly undertaken procedure under which the lower court introduced the procedure before the Constitutional Court on behalf of the plaintiff’s right to vote, making it possible to start the judicial review of constitutionality of the electoral legislation in question. The true reason behind was not the plaintiff’s right to vote which was said to be violated by the electoral law. This was interpreted as a feigned dispute (*lis ficta*) brought in for the special purpose to hear the Constitutional Court ruling.

The Czech case, under the popular name “Melèák”, was brought in before the Constitutional Court with the aim to struck down the legislation (a constitutional law) that would made it possible to shorten the term of the one of the Chambers (Chamber of Deputies) of the Parliament and call the early general elections. The legislation in question was passed by both Chambers of the Parliament under the very rigid procedure that required the 3/5 majority vote. Such a procedure applies for constitutional amendments. This time the institution which lost the dispute was again the Parliament. This time the Constitutional Court did not protect the right of the Parliament to decide over its term by itself by an ad hoc decision but protected the right of the one MP to let his mandate until the very end of the regular term. The legislation was proclaimed violating the constitution because it circumvented the prescribed procedures. As a result, the early elections were not held, and it was the Constitutional Court who on behalf of the rule of law principles limited the elected legislature to decide of its own “lifespan”.

The British case is currently under a thorough survey. Taking it rightly when considering the long tradition of sovereignty of the Parliament, one would expect that judicial involvement in ruling on the status or on the powers of the Parliament, should not be strong. The cause of Brexit in several ways opened room for justices’ ears. The Supreme Court does not diminish the power of the Parliament, on the contrary. Moreover, needless to stress, the Parliament although in core of the Brexit decision procedures, faces difficult situation stemming from direct protest actions outside the Parliament. As Michael Gordon puts it: “*Brexit is no longer a vision of the future..., instead it is the prompt for a potentially remarkable recalibration of the UK constitution which was neither expected nor prepared for.*”⁸

IV. Concluding remarks

I have observed only some fragments of the big issue that is the issue of populism of today. What raises worries is the fact that what we consider to be populist, concerns population only partly or in a short time span. Populism is present within the institutions and may hamper the decision- making process. If we look at propositions forwarded recently by different popular movements, they offer simple solutions for complex issues in a seemingly easy ways with prompt results. To my view this is the very core of any populism, either of right or left ideological origins. In some respect it appears that it covers up the socio-economic and cultural cleavages that were at the core of strong political parties.

Then the essence of constitutionalism which was designed to set up stable rules for both free and fair competition is slowly eroding. The competition between institutions that claim to be more legitimate than the others and to have the ultimate word over decision at stake goes

on and on. If the constitutionalism on national level serves as a model for EU constitutional framework, one should be aware of those *malaises* the member countries have. Including populism, partyless system, or unsettled and fragmented parliamentarism. Courts in general do defend the constitution but incidentally they may be attracted to take the “social contract” out of the hands of parliaments.⁹

Notes

¹ J.S.Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*, Everyman's Library, London. 1910, reprinted 1988, pp.258-259

² This was called by a petition initiative lead by citizens' of public renom  including one of the leader of gilets jaunes Priscillia Ludosky. The work of the assembly is to be launched in the Autumn 2019. *Le Monde Dimanche 14-Lundi 15 Avril 2019*.

² Tobias Lenz and Lora Anne Viola, Legitimacy and institutional change in international organisations: a cognitive approach. *Review of International Studies*, Vol.43, part5, pp.939-961

⁴ Jir  Prib n, *The Defence of Constitutionalism. The Czech Question in Post-national Europe*. Karolinum Press.Prague 2017.

⁵ Marek Nimeck y,  esk  republika v Evropsk  unii – Co ob an  o ek vají a  eho se ob vají? V sledky reprezentativn ho sociologick ho v zkumu (*Czech Republic in EU – What the citizens expect and what they are afraid of?*) Friedrich Ebert Stiftung e.V. 2016

⁶ Bogdan Iancu, Can people decide (in Europe)? Uses, abuses and fear of referendum. *Romanian Journal of Comparative Law* No1/2018, Mathias Revon, Le Dilemme r f rendaire entre l gitimit  democratique et  tat de droit. *Romanian Journal of Comparative Law*. No1/2018.

⁷ Caruso, Corrado; Goldoni, Marco: *Halving the “Italicum” :The Italian Constitutional Court and the Reform of the Electoral System*, *VerfBlog*,2017/2/28, <https://verfassungsblog.de/halving-the-italicum-the-italian-constitutional-court-and-the-reform-of-the-electoral-system/>, DOI:<http://dx.doi.org/10.17176/20170301-091307>. The authors made it explicit: “Nonetheless, Parliament itself might have a chance to redeem its political capital by approving a new electoral law before next general election. Such a law is actually urgently needed given that the combination of the outcome of the referendum and the unconstitutionality of parts of the Italicum have made the electoral system of the lower Chamber and the Senate quite different – both in terms of electoral logic and of the design of the constituencies. The Court itself rounds off its judgment (section 15.2) with the suggestion: ‘in this context, even though the Constitution does not require the introduction of an identical electoral system for the two chambers of Parliament, it still requires that, in order to avoid the disruption of a functioning form of parliamentary government, both systems will not block the creation of homogeneous parliamentary majorities after the outcome of the election’. In the current political context, it is not going to be easy to find a majority to approve a new electoral law. But it is already quite clear that the logic behind the Italicum has been dismantled by the Court”.

⁸ Michael Gordon, Brexit: a challenge for the UK constitution, of the UK constitution? *European Constitutional Law Review*, 12:409-444, 2016

⁹ Jir  Prib n when advocating for the essence of constitutionalism states that „The great threat to constitutional sovereignty does not come from outside, but rather from within, and not from one but from many sides.The Czech state will not dissolve like a sugar cube in the European Union, but faces decomposition in the quagmire of various private groups'private interests.“(Prib n: 183-184)