

Judicial review: Eastern Europe at the end of the millennium

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• Abstract

Nowadays, at the end of the millennium, we feel more and more the necessity of being able to control the policy making, the decision taken at the governmental level that after all will influence our lives to a certain extent.

Most of the present-day societal structures are compelled to obey social rules imposed by more or less severe legal regimes. The connection between the political and the legal in one's vision is definitely more and more significant. The power vested in both political and legal structures are interconnected in various ways, sometimes being so complex that the usual citizen labels it at least obscure.

One of the most important concepts of the constitutional legality became nowadays the judicial review. If we take a look at the European certified democracies as well as to the democracies "in transition" (former communist countries in principal), we notice that judicial review of the constitution was made available at least theoretically even if de facto its use is still extremely reduced on an overall scale. Practically, the availability of the judicial review is said to represent a check on and between the political powers. We are talking here about the traditional trias politica, thus not attaining the newly accepted institutional powers in politics: the bureaucracy and the interest groups. The hereby paper will focus on the newly democratized states formerly said to compose the Eastern Europe. The classification is nevertheless based

not on a geographical criterion, but rather on former belonging to the block of communist countries, also referred to as “satellites of the Soviet Union”.

The implication of the judicial review for the states in Eastern Europe is a special one. Leaving a few decades under a strong authority, which could manipulate and interpret the laws in its own way, the people in Eastern Europe wanted first of all that the fundamental law is above the government. Second of all, as evidence will be given further in the paper, people wanted that constitution be changed when it turns against them. We will insist on the provisions in the constitution especially made to protect the ones loyal to the regime to escape the consequences of a real, impartial justice. This was one of the important factors to argument for the existence of the judicial review. Romania and Hungary will constitute pillars of the present research paper; nevertheless the paper will try to stress and justify the necessity of the constitutional review using evidence and for most of the countries in Eastern Europe.

During the last decade and in the present-day Eastern Europe, states face approximately the same set of problems bequeathed by their Communist past. There is a set of common question that arise immediately after the entrance in the new democratic era of these former communist states: First, what should they do about crimes committed under the Communists but never prosecuted? Second, what is to do about the widespread use of capital punishment in view of the Council of Europe’s strongly disfavoring capital punishment? Further what should they do about property rights that were sacrificed in the programs of nationalization of property carried put by the Communists? These matters challenged constitutional legality and there are many examples where the Constitutional Court had to decide upon the constitutionality of certain laws proposed by the government.

The present research paper sustains and tries to justify the existence of the judicial review as an option for any democracy in general. The absence of a judicial review in a democratic society is only possible when very particular conditions might justify it, but Eastern Europe, for instance, represents one of the regions that cannot preserve the new acquired democracy without having the constitutional court as an institution.

• Introduction

Before anything else, we should take into account the concept of “constitutionality” and its modern connotation. In the 19th century, the English jurist, Dicey argued that the rule of law involves more than just simply government through (by the means of) laws. It also involves government under the rules. Therefore it seemed justified that there must be laws about the way rules are to be made. In other words, constitutionality means that there are some superior rules (the constitution in most of the cases) above the political arena, which practically indicate how governors are to govern. Consequently, every member of the certain government, officials or police is in the end subject to the same laws as all other citizen.

Further on, the dilemma arousing was maintaining constitutionality in liberal societies. The first and the most important institutional device to maintain the constitutionality was the theory of separation of powers. The power should not be

concentrated in any one part of the state and moreover, each part should act as a check or balance for the others. Even if the theory of separation of powers was worked out in detail, it was not sufficient yet for a complete democracy, as the latter developments presented.

Now, focusing on the judicial review, in a very brief stating of its function, it means that the courts, as the third branch of the government, have the right to overturn as unconstitutional decisions of the two other branches of government. It is a known fact that in the United States the judicial review has in general greater importance than in Europe. Nevertheless things seem to have changed and Europe deals more and more with the use of the constitutional review as such.

The newly democratized states in Eastern Europe have adopted revised or new constitutions in the last decade¹ so that at the end of the millennium we find them in a completely different constitutional legality setting. Initially the fundamental law was subject to the power of the communist government. On the one hand the constitution was designed in such a way that was most suitable for the communist government to exercise its power in vaguely established limits. On the other hand the constitution provisions that could alter the power of the government were not respected de facto. Moreover and what is the most important for the present research paper is that new provisions were added to the constitution without the possibility of anybody objecting them as being unconstitutionally. It has to be stated that the main reasons for which the new democracies have established constitutional courts was for interpreting and enforcing their local constitutional safeguards of human rights. Eastern Europe has been a place where communist rulers acted as dictators; the hallmark of dictatorship and thus also of communism was the government's participation in committing crimes against citizens. Because, naturally, the government controls the prosecutorial establishment, these crimes are never prosecuted. In the communist era, Eastern Europe has been unfortunately subject to such odious crimes. Certainly we cannot forget the bloody years 1956 or 1968 when Soviet tanks rolled into Budapest, respectively Prague to squelch the movement towards democracy, with the request and approval of the communist leaders of Hungary, respectively Czechoslovakia. Many executions followed both invasions, many people were reduce to silence by death because they wanted democracy, because they shouted "Freedom!" on the streets.

Obviously, after the 90's, the victims of this repression, the ordinary citizens requested that the crimes should be punished. This is one of the instances where the Constitutional Courts around Eastern Europe had to decide how to proceed and whether it is a constitutional act or not to prosecute those obeying high orders and being subject to the authoritarian leaders of the communism regime. The Constitutional Courts in all these former communist countries was really an active institution within the judiciary branch. The judiciary review is still an intense activity around Eastern Europe, mainly due to its past, partly due to present-day problems aroused because of the challenge of democracy.

¹ For instance, the last constitutions date from Romania, 1991, Hungary, 1997, Albania, 1993. In general, all Eastern European countries have revised more or less their constitutions in the 90's.

• **Comparing Constitutional Court activity around Eastern Europe**

Examples of decisions concerning death penalty and prosecutorial discretion taken by the Constitutional Courts in Eastern Europe

We will begin analyzing the activity of the Eastern European Constitutional Courts after 1990 with an episode from Romania, from January 1990. On December 25, 1989, the communist dictator Ceausescu and his wife were sentenced to death by a secret military tribunal and immediately executed. On December 26 the Council of National Salvation, which had grown out of the revolution, has abolished the death penalty mainly because of international pressure (in particular the Foreign Affairs ministers of West Germany and Sweden were present in Bucharest advising the new democratic government in their next steps). Nevertheless, many Romanians wished that the close collaborators of Ceausescu, the leaders of the Central Committee of the Communist Party, were put to death. Thus, on January 12, 1990, a huge crowd gathered in front of the headquarters of the Council of National Salvation shouting "Death to Communists". Under the pressure of the crowd, the members of the Council promised that in January 28 a national referendum would be held on the reintroduction of the death penalty. The Constitutional Court did not exist but that time in the actual form, but still, some members of the Council of National Salvation opposed the referendum on the grounds of unconstitutionality in decision over the death penalty at that time, given that the crowd wanted only death to the communist leaders. In a full session of all the Council (it numbered 145 members), the decision of holding the referendum was cancelled, being motivated that the promise was made "under the pressure of the crowd". The international observers praised the decision of the government even if, at that particular moment, this turned against the wish of the people.

What is relevant in this event is that the role of the judicial review, of deciding over capital matters, like the death penalty, is extremely important. Western observers might make the mistake of thinking of the constitutional courts in Eastern Europe as courts in the narrow sense. Nevertheless the role of the Constitutional Court is extremely important in Eastern Europe. Major decisions are dealt with by this institution and the outcome can sensibly influence the both the legal and political dimension of the respective states. Sometimes the Constitutional Courts have to work even against the will of the people in deciding these matters. As we will see also from other examples in Eastern Europe constitutional legality and judicial review among the most important concepts within the juridical life of the region.

If we draw our attention to Hungary, the role of the constitutional court is revealed in great measures. In October 1990, the newly constituted Constitutional Court in Budapest heard a complaint of a law professor from one of the provincial cities in the northeast Hungary, challenging the constitutionality of the death penalty in Hungary. After a short session, the Constitutional Court convened and declared capital punishment unconstitutional as an arbitrary violation of the right to leave. This was certainly a huge event in the activity of the Hungarian Constitutional Court and it would have been a huge event in the history of any Constitutional Court around the world. Apparently with great ease, the Constitutional Court abolished the death penalty at the suggestion of an individual citizen, something that especially for the US readers would certainly seem at least in the domain of the fantastic. Surveys

conducted at that time show that at least a simple majority of the Hungarian citizens were still in favor of death penalty at that time. The Constitutional Court assumed a great responsibility in abolishing the death penalty on grounds of unconstitutionality.

We move to a very sensible matter, prosecuting the crimes from the communist regime that were not prosecuted due to the statute of limitations, namely crimes justified with loyalty for and for the cause of the communist regime. A relevant case is taken again from Hungary. The Hungarian Parliament responded in November 1991 to the popular demand for prosecution by enacting a law that suspended the statute of limitation for the crimes of treason, murder and related crimes of violence, when the reason for non-prosecution was political. There was an assumption underlying this decision, namely that the Communists were complicitous in these unprosecuted crimes of violence and therefore they naturally refused to prosecute them. The President of Hungary delayed promulgating the law and asked the Constitutional Court to decide on the constitutionality of this law. In March 1992 the Constitutional Court ruled that the statute of the law was unconstitutional as a violation of a provision in the Constitution that recognized Hungary as an “independent democratic Rechtsstaat”. The Court relied on a variety of arguments, all of them linked with the rule of law.

It is important to see that the Constitutional Court decided against the will of the citizens, a case similar with the episode after Ceausescu’s death in Romania. In contrast, going back to Romania, we will see that the Constitutional Court decided to listen to the will of the people.

In the early 90’s, one of the Romanian senators came with a project of a law that briefly was allowing everybody to access their files belonging to the ex Secret Romanian Service. That would have meant that everybody could have seen the names of the informers and the eventual names of the Secret Service that were responsible with their files. The “Ticu Dumitrescu” law, as it was called (after the name of the Senator) encountered opposition immediately in the Parliament. After a few rejections because of lack of majority votes and after being revised a few times, the law got the approval of the simple majority of the Romanian Parliament in 1999. Practically it was just a part of the initial law, the citizens being able to access their files but not entirely, thus the names of the people involved not being disclosed. Even so, the members of the Parliament that voted against asked the Constitutional Court to decide on the constitutionality of the law (a group of at least 25 members of the Parliament can attack a law on grounds of constitutionality, sending it to be analyzed by the Constitutional Court). After a long debate, the Constitutional Court ruled that the law in its last form did not violate the any provision of the constitution, in particular the right to privacy, advocated by those opposing the law.

Thus, in this case, the Constitutional Court sustained the popular will and decided a conservative and prudent way of acting. The law was promulgated by the President in October 1999 and in its policy outcome is to be seen in the next months.

Rulings and decisions of the Constitutional Courts regarding nationalized properties and claims on ethnical minority grounds

A present dilemma that most of the governments in Eastern Europe are faced with is returning the nationalized property of especially the national ethnical minorities performed during the communist era. After the communist takeover, during nationalization (1940-1950) the national minorities in Eastern Europe in general were deprived of their property, institutions (except for the churches) and educational system. No doubt, the elimination of private property and civil institutions as well as centralization hit everybody in the communist countries but national minorities suffered more than the others.

The freedom and democracy acquired after 1989 raised among others voices long time reduced to silence during the communist regime. Those deprived of their property during the communism requested their properties back. The government find itself faced with extremely sensible issues: returning properties that nowadays are the place of public institutions such as public university buildings, for instance.

Romania has been confronted with these kinds of claims immediately after the revolution in 1989. Especially citizens belonging to the Hungarian ethnical group wanted their properties returned. Compromise was difficult to be achieved from both parties, in most of the cases; as a matter of fact most of these problems are still not solved nowadays and every new government tries to find other solution. One of the most interesting cases in Romania was the claim of the Roman-Catholic church over its huge properties that were nationalized in around 1960. In Cluj-Napoca, one of the major cities in Romania, the church claimed the right over a public high-school territory, so the local government almost accepted the claim and the students were about to be evacuated. Nonetheless, some of the Romanian Parliament members thought the claim was unconstitutional and asked the Constitutional Court to decide. Surprisingly the Constitutional Court did not find any violation of the constitutional provisions so it was decided that the Church was entitled to that property. Fortunately, in the last moment the representatives of the Church accepted a compromise, namely another terrain, so that the high school could continue its activity.

The Constitutional Courts all around Eastern Europe have been faced not once with separation claims on ethnical grounds, starting 1990. Romania does not make an exception. In November 1998 a Romanian university teacher wrote the "Transylvanian Letter" which was signed by about 100 other persons. The "Transylvanian Letter" claimed the splitting and autonomy of Transylvania on ethnical and historical grounds. Naturally the document generated a lot of discussion and a counter act signed by the most prominent intellectuals in Transylvania was written. Almost 500 intellectuals signed for it and stated that the claim of the Transylvanian Letter was not founded. Sabin Gherman, the initiator of the "Transylvanian Letter" was sent into trial. The facts did not stop here, because some members of the Parliament claimed that such an issue is of the competence of the Constitutional Court. On the base of present data the issue of whether the claim of Gherman was constitutionally or not is still debated in the present-day.

Issues related to ethnical minorities are nowadays amongst the most important facts that the Constitutional Courts around Eastern Europe are currently faced with. Naturally, linked to this matter and to other extremely relevant dilemmas, it is interesting to see what is the legal authority of the Constitutional Courts around Europe.

Legal authority of the Constitutional Court in Eastern Europe

In general in Eastern Europe the role and the function of the Constitutional Court are very important contexts. In all Eastern European countries (the present research paper did not find data to contradict this statement), the laws are pretty much similar regarding Power, Independence and Purpose of the Constitutional Court. Namely, the Constitutional Court is the only authority of constitutional jurisdiction, the Constitutional Court is independent of any other public authority and it shall be subject only to the Constitution and to the organic law regarding its functions and the purpose of the Constitutional Court is to warrant the supremacy of the Constitution.

Having these privileges, the Constitutional Court in Eastern Europe proves to be one of the most mature institutions within the juridical field. Practically a lot of power and trust is vested in this institution. All these can be explained due to a past characterized by an authoritarian government that put itself above the law.

Moreover, the competence of the Constitutional Court is extremely high. Quoting from the articles relevant in this respect (from the Romanian law regarding the constitutional court, which is nevertheless similar in most of the Eastern European countries), we have that

- (1) The competence of the Constitutional Court cannot be contested by any other public authority
- (2) The Constitutional Court shall be the only authority entitled to decide upon its competence.

We see that the competence of the Constitutional Court cannot be contested. The judicial review is therefore definitive, the Court being the only authority to decide upon its own competence.

The legal authority given to Constitutional Courts is reflecting in politics as well. Having the power to overturn the standing orders of the Parliament and statutory orders of the Government, the Constitutional Court represents the major check on the other 2 powers, the Parliament and the Government, performed by the Judiciary branch. Thus, a second reason concerning the general implementation of the Constitutional Courts in Eastern Europe is represented by the specific checks and balances that this implementation brings in.

• Conclusion

Eastern Europe cannot survive without judicial review. Being a region of this world, that recently opened itself to freedom and democracy, Eastern Europe does not want this freedom to be taken away from it. Eastern Europe learned from its own experience that power has to be controlled and that an ideology made for the people can turn against people if nobody watches it. Eastern Europe decided that the rule of law has to work together, in the same dimension, with the human rights. There is no better acknowledged tool in order to interpret and enforce local constitutional

safeguards of human rights than having the judicial review according to the present opinion of East-Europeans.

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