

PARLIAMENTARY SCRUTINY AND CONSTITUTIONAL REVIEW

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Abstract

The strength of the Parliamentary oversight lies with the efficiency of the tools meant to be for the parliament to scrutinise the cabinet. This principle is at the core of the parliamentary regimes. One of the tools- the vote of confidence (non-confidence) – is at large perceived as the most rigid with heavy consequences for at least one actor – the cabinet, who is expected to resign. However, there are questions to be raised, whether the very rigidity of the tool traditionally designed for the opposition is nowadays meant to be used for killing cabinets. Some of the parliaments do not provide a clear-cut line between the majority and the opposition, some of them do not even have stable factions. In such a case faction membership flexibility and loose party loyalty may produce the killing of the parliament, provoking early elections. Parliamentary oversight thus turns to be a dangerous undertaking for the parliament itself. There seem to be another oversight tool which seems to be more efficient and offers better guarantees for the stability of both rival institutions: it is the motion and the power to put forward a claim for constitutional review by the Parliament itself. Cases to be studied are drawn from the Central/European Parliaments since in these countries the constitutional review is a rather new phenomenon.

INTRODUCING THE SUBJECT

Scrutiny as well as review are tools of control mechanism, however done by different bodies. How to analyse methods of control executed by different bodies and actors by definition and yet connect them both under a related formula. Whose control of whom? The first ground for analysis is the relation between the two powers: between the power to legislate and the power to annul the legislation, between the power stemming from democratic representation and the power arising from the principle of constitutionalism, between the power of the majority and the right of counter majority.

Demands for strengthening the parliamentary scrutiny comes from the very acute feeling that the parliament is left behind the executive effective power. That the parliament is in the deficit of information, deficit in expertise, deficit in public

support, deficit in creating efficient policy communication, deficit in the impact on the salient policy areas, deficit in the European Union agenda. The stronger the call for legislative work is the more doubted the quality of pieces of legislation is and the more the parliament is in the vicious circle of legislative fragmentation. Strong parliamentary scrutiny is evoked as a must not only on the national level, not only on the EU level, but also in a way “in-between the national and EU framework”. This comes particularly in response to the post-Lisbon EU setting and the overall financial and budgetary crisis. Parliaments are put into the network of “virtual” third chambers (Cooper 2011) in order to strengthen the scope of control over the proportionality and subsidiarity principles and to make them voice as actors not as much as policy-making but policy-influencing bodies. The virtual third chamber is evoked as space for communication and close cooperation among national parliaments of the EU Member States in the control of whether the EU legislative acts do not breach the scope of competences delegated to them by primary law. The main role of the national parliaments consists of scrutiny of the EU matters thus overcoming and extending the potential for scrutiny on sub-national level. In the same logics the impulses to provide the European Parliament with new powers of scrutiny on the fiscal and budgetary policies of Member States is the follow-up of the European Commission power to introduce measures towards those members who are less disciplined in their fiscal and budgetary obligations within the Eurozone. All this comes as a reaction to the overall feeling that something must be done in order to stop the “de-parliamentarization” process and to put new incentives to the re-parliamentarization. Therefore, parliamentary scrutiny is considered to be one of the efficient ways to make the parliament well established and better involved in the decision and policy making process, as well as in the EU legislative process. This may also make the parliament more aware of its representative and deliberative roles. No matter how difficult and uneasy it is to put all these good ideas and intentions into practice, there is no doubt that in general, power scrutiny and effectiveness come only when scrutiny becomes part of political and legal framework and is part of the checks and balance logics. We can even go further and suppose that both scrutiny and review might shape and cast light on what kind of government we encounter. Sonningsen (2010) observes that the functional logic between the main institutions in the EU provides insight into whether the EU “behaves” more like a parliamentary or presidential system. He suggests that the vote of confidence as developed in the interaction between the Commission and the European Parliament resembles rather the procedure of *impeachment*, since it serves as a sanction against the Commission or Commissioners for legal or ethical misconduct and along with other aspects of the censure vote (two-third majority required, for instance, or a missing power to appoint is thus compensated with the power to remove). The –mentioned arguments rightly illustrate that parliamentary scrutiny tools may not necessarily produce the same effects even if they are of the same category. Above all they may, together with other circumstances, establish different type of interaction and also different type of executive-parliament relations. Moreover, introducing the motion of censure does not directly invoke more parliamentarism or better and stronger parliamentary control over the executive. In this article I analyse the impact of both traditional parliamentary scrutiny and constitutional review on the executive. The reasons are the following: firstly, the traditional vote of (no)-confidence together with other is directly addressed to the

prime minister and the cabinet minister either collectively or individually with the main aim to discredit them on the ground of malfeasance in their specific policy area. The main objective is to make them challenged by the vote in the House with the likely strong effect of public eye's strict watch. Secondly, the constitutional review is not directly aimed at the prime minister and the cabinet misgiving. However, since the parliamentary regimes do strongly support the cabinet role in initiating the bills in the House, we may assume that any killing of the cabinet bill by the constitutional court may manifest its severe opposition not only to the parliamentary majority but also to the government of the day. Such a Court decision does not necessarily lead to the cabinet resignation but may invoke serious harm to the government policy implementation and therefore it may provoke public resilience (or parliamentary break in confidence). While we may easily test the frequency of the number of motions introducing the vote of no confidence in the House, it is harder to assess rightly the effects of all possible defeats before the constitutional courts with which the cabinet may be indirectly confronted.

Vanberg (2001) when assessing the model of interactions between legislatures and constitutional courts states that legislatures are non inert to the judicial rulings, that they anticipate them, react to them and make strategic choices in order to minimize unexpected implications of such rulings. The legislatures behave in such a way under the presumption that they feel obliged to observe the court rulings, given the primary purpose of the constitutional design, that even a majority is bound by the court whose power is to decide where the limits of the stronger by majority actor are. Central European constitutions were designed primarily to institutionalize Constitutional Courts and constitutional review mechanism which were until then undesired and left behind in many of the countries (with the only exception for post WW-I. in Czechoslovakia and Austria). Scholars - both legal and political science scholars, together with political elite stressed that the transition and transformation to democracy goes hand in hand with the institutionally guaranteed constitutionalism. Such constitutionalism which allows scrutiny of the people's representation on legal grounds and legal -rule of law- principles. Such constitutionalism is strongly supported if the constitution is a result either of the general acceptances expressed in the general elections or in the referendum. Justices then may have such a strong power to annul a legislation or its sections only if they themselves are part of the overall constitutional space, where everyone is bound by the constitution. Then we do not observe any resilience towards the institutionalization of the Constitutional Courts in the EEC. Even the EEC parliaments adapted to the idea of self-restrain in case they would be confronted with the "unfriendly and strict" review from the Court. The expected influence and impact of the constitutional review was taken as it would serve good cause in the long run. Although the constitutional review has been by the layers community widely accepted at the time, since the establishing of the Constitutional Courts the ideas about its role and function have changed, and there are disagreements as to what extend and what scope of the judicial power is justified. The debate on the power of judiciary is not therefore purely an American debate¹. We found out that similar questions as

¹ As mentioned by Keith E. Whittington, Princeton University in the curriculum of the subject on Theories of Judicial Review. POL 565- Theories of Judicial Review. Fall 2011.

possibly raised by American scholars are troubling constitutional lawyers in EEC as well. Unlike American debate we do not question the legality of the power over the Constitution whether it is implicit in the Constitution or not. However, we may share same worries as to the activism of the Constitutional Courts and as to the perhaps more salient question whether the activism is good and necessary or not. We can share the similar worries as to whether judicial power and democracy can be reconciled? If the Constitutional Court is more adapted to judge and decide on constitutional compliance, is it a specific political power competing with the parliament for the public support? Even if many time the competition is not necessarily open and in most cases is rather carefully hidden under legalistic reasoning, it is not excluded neither in certain cases absent. If such power is present, what are the likely implications for democracy and for democratic principles and values to be reinforced by the specific nature of Courts rulings and power? Is not then and after all the Constitutional Court independence a myth which is presented to the voter? The aim of the paper is not to focus on the whole aspect of constitutional review, on the content analysis of the rulings and justices opinions or on the structural and personal aspect of the Courts. I rather focus on the leading cases which are of great importance for the parliament role in the constitutional framework of the country. My main interest is in two countries: the Czech Republic and Slovak Republic. Some of the examples are drawn from other countries in similar cases. Vanberg (2001) observes that in times parliaments do evade from the decision (they may acknowledge a decision but fail to address it) of the Court and that from time to time even the public does not “punish” the legislature if it fails to comply with the Court decision. Difficult interactions between the Parliaments and the Constitutional Courts are on the following paragraph illustrated on the selected cases analysis.

RESEARCH QUESTIONS AND ANALYSIS

- Constitutional review was understood as a new transitional tool providing for better protection of constitutional rights even against the power the exclusive parliament’s powers to legislate
- Constitutional review’s goal was to protect parliamentary opposition against the parliamentary majority
- Constitutional review is a much more efficient tool to scrutinise the cabinet compared the the vote of no-confidence- (what are the good examples)?
- Constitutional review may threaten the representative (parliamentary) democracy for the sake of rule of law principles
 - Under which conditions the principles of rule of law do contradict principles of the parliamentary democracy?

A: The Czech Constitutional Court leading rulings

Case One:

In 2009 the Czech Constitutional Court annulated the constitutional law on early parliamentary elections to be held for the Chamber of Deputies. Usually, such a law

is not required in order to hold general elections, since they are held regularly in four year term interval. This time a qualified majority of 3/5 in both chambers agreed to solve continuous tensions and open clashes between the opposition and the cabinet by passing the constitutional law providing that the term of the Chamber of Deputies is to cease by the specified date- October 9-10, 2009, which was also the schedule for the early elections. Passing of the constitutional law is a very hard and rigid procedure that requires support from both opposition and government MPs. This was the case. This type of constitutional solution was already found some ten years ago in 1998. At that time, the case was not forwarded to the Constitutional Court. Naturally, many would question, why the Parliament (both chambers) choose to call general elections by amending the constitution *ad hoc*? One of the answers would be along with the logics of institutional reasonability: the Chamber could work until very close to the electoral day without leaving its legislative power behind and without giving up the legislative work in progress on behalf of the Senate. And the electoral campaign could easily be done on the floor. In case other solutions be chosen for holding the early elections, the Chamber would be dissolved (which is the power in the hands of the President of the Republic who is not bound to do so), a regular electoral campaign would be carried out by parties outside the Chamber and the power to legislate would pass over to the Senate. The opposition according to the different opinion survey sources was by many indicators the likely winner of the announced early elections. The opposition in the series of motion on the vote of no confidence proved to be strong enough to the defeat the PM and the cabinet in the House and the new cabinet was appointed with interim mandate. The situation appeared to be crystal clear... Except for a unique procedure entered by one of the MPs who he claimed his right to serve his mandate by the regular term of four years, and came before the Constitutional Court to decide on the compliance of the said constitutional law with the Constitution. Never was the Court in front of such a delicate situation as to decide on the constitutionality of the amendment of the Constitution which was adopted under a fair, legal and transparent procedure. After all, the Court made it clear: this law, however passed according to the prescribed procedure, is not in fact an amendment to the Constitution because it does not change in any sense the Constitution, which is always the purpose of any amendment. So legal arguments were found in order to advocate for substantive, as opposed to formal interpretation of the meaning of the principle of constitutionality. Shortly, any amendment should not contradict solutions which are provided for by the Constitution itself (instead of passing the amendment the parliament opposition should seek for regular dissolution). In this vein the Court argued that the constitutional law violates the Constitution and therefore is declared invalid immediately. Additionally, any *ad hoc* law is not consistent with the principles of rule of law, since according to them it is not allowed for the legislator to make laws for particular or individual cases. For being an *ad hoc* and not a general rule, the amendment was killed.

To what extent, this ruling strengthened the position of the Court? Apart from innovating the legal interpretation of what the wording of the Constitution is (which which not the explicitly the power of the Czech Constitutional Court, unlike in the case of the Slovak Constitutional Court), the justices used their power to stop the Parliament (in whole, meaning both chambers) to hold general elections. Under the

cover of the procedural protection of an individual right of a Member of the House to serve its mandate till the end of the term, it denied the right of the majority of the democratically elected representation to turn back to the voters and seek support. Under the legal arguments that an ad hoc amendment is not a true amendment and not worth of being part of the body of the Constitution, it extended its power to decide on the life and death of the House. The reaction of the Parliament was immediate: it passed a new amendment under the same format of a constitutional law with the support of the same rigid 3/5 majority of votes but with a new, this time, general, rule providing for the Parliament to call early elections on the basis of its own resolution. The core of the dispute between the “guardian” of the constitutionality and the Parliament lied in the substance of the relations between two opposing strategies of how to solve the political crisis not only between the government and the opposition but at the same time within the government majority (however tiny it was that time) between the parliamentary and party dissenters and the President in office. This time the political and institutional crisis was not solved on behalf of the electoral and representative democracy but for the sake of the “reasonably and legally” defined constitutional stability. The Court ruling had another possible impact on the Parliament strategic choices. The usage of the motion of censure, however successful it may be, does not necessarily lead to the general electoral contest. Elections and their legitimizing strength are rather to be avoided, since they may turned to be too risky in result for both the majority as well as the opposition in office. Any open contest (between the majority and the opposition) on the floor or outside the Parliament is to be carefully weighted.

Case Two:

In 2000 the Czech Parliament passed a new amendment to the electoral law in force, reforming importantly the mode of proportional representation system, in the purpose of strengthening the winner’s position and enabling the winner to establish a stronger post-electoral coalition (if necessary) majority. This electoral amendment did not, in order to be passed, require a qualified majority approval, nevertheless the votes for the bill were to be taken from both main rival big parties in the Chamber of Deputies. A group of Senators opposing the reform, brought the case to the Constitutional Court, challenging the law which changed the character of proportional representation principle in such a substantial way that it contradicts the rule of proportionality as fixed in the Constitution. The Senators did voice the minority opinion of the parties which were left over by the two big parties, Social Democrats on the left and Civic Democrats on the right. The Constitutional Court ruled in favour of those who claimed (both the group of Senators and the President of the Republic) that if the Constitution says what the specific electoral rules are for the elections to both of the Parliament chambers, and if it outlines the difference between the principles governing the elections to the Chamber of Deputies (proportional representation) and to the Senate (single member constituency) then the difference should not be changed by any legally set alternatives reconstructing the meaning and the reasons behind the logics of different electoral systems for different chambers.

In particular, it would be misleading to ask whether Senators could use other ways of challenging the government strategy to modify electoral legislation. The Czech Senate cannot use direct parliamentary scrutiny tools as it is the case for the Chamber of Deputies. It is so because the Government is directly responsible to the Chamber and not to the Senate. In the above described situation the two big parties concluded a concordat (Government-Opposition Concordat) according to which, among other, the party in opposition would not challenge the minority Government by any vote of no confidence. For minority parties (Christian Democrats, for instance) the only efficient way how to challenge the Government reform as backed by the opposition in the Chamber, was to go through the Senators' right to address the Constitutional Court.

B: The Slovak Constitutional Court ruling

Case One:

In 1994 the Slovak Parliament passed the bill (L.no.370/1994) by which government decisions on passing particular titles of privatization of the state assets, were declared invalid. The Parliament by its majority of 80 out of 150 votes, intended to stop previous interim government practices to conclude contracts and sell directly state owned companies or state assets at large to private persons. Passing of this bill was considered to be in breach of the rules set up earlier in the 90's, when privatization process was on the whole supported by many political parties. However, the Slovak government of the day changed the scheme and passed the power to decide on particular projects to the government agency (National Property Fund). The recently elected parliamentary majority backed the government proposal of the bill and used its legislative power to stop the previous government in its privatization activism in some 30 cases. It was challenged by a group of mainly opposition MPs who asked the Constitutional Court to set up on whether this law is in compliance with the Constitution, claiming that the protection of already acquired property rights should be carefully guaranteed. The ruling of the Court was in favour of the claim of unconstitutionality. It stated that the legislature cannot use freely its powers to legislate and that it is bound apart from the Constitution by the constitutional principles of democratic government. Although, the Parliament is on the one hand, the only legislator in the Slovak Republic and can legislate on matters which are not explicitly mentioned by the Constitution on the other hand, it should respect other organs whose competences are legal and constitutionally fixed and thus justified. This includes the power of the government to use its discretionary powers. If the Parliament is to scrutinise the government whose responsibility before the House is provided for by the Constitution, this scrutiny cannot be restrained to the vote of no confidence. The vote of confidence is too general as to questions which can be addressed by using it. However the scrutiny may be rather done in different ways and even by different parliamentary organs or committees. As for the variety of controlling mechanism the Constitution is rather tacit. Its wording does not speak in favor of any such control which would consist of annulment of the government decision (in a form of a resolution) via legislative procedure and by a specific piece of

legislation. In other words the form of a law does not justify the power of the legislature to watch over the government activities when adopting its non-legal acts (resolutions). The government is the supreme body of the executive and it is given full competence to act within the margins as outlined by the Constitution and laws. The government competence to decide on the privatization projects was provided for by the law (Law no.92/1991 Zb.z. as amended by the Law no 60/1994 Z.z.) and cannot be overturned by a subsequent legal act. It is in the scope of government power to decide which of the branches of the industry, agriculture, services at large would be privatized, what would be the candidate for the privatization project, or what are the conditions for the privatization legal title. Therefore, since the power to legislate is not meant to be the power to scrutinise the government, the law which invalidates the government act (a resolution, in this case) is not in accordance with the constitution. The Court accepted the idea that particular decisions by the government on to whom to sell the state owned companies enters in the category of individual legal acts and as such might be protected under the framework of citizens' constitutional rights and freedoms.

This case clearly illustrates that the Constitutional Court interpretation of what exactly enters into the scope of legislature's capacity to scrutinize is rather restrained and stuck to the formal wording of the Constitution. It also limits the understanding the power of the House majority by votes and seats, which cannot use its electoral supremacy against the principle of the balance of powers in the parliamentary government. The substantive analysis of the case does not, however, introduce the reader to the complexity of privatization projects, to the low transparent standards of decision-making process and to the party in government strategies, in this case both interim government and elected government, when seeking the parliament majority support. The Constitutional Court ruled in favor of the parliamentary minority to dismantle a likely large interpretation of the importance of the parliamentary scrutiny (especially of the vote of confidence) *vis-a-vis* the government. Also, there is a tempting question to be asked: would the opposition the House be successful if choosing to scrutinise the government by the vote of no confidence? The answer is likely evident: not in that case. Given the fresh post general elections position of the party in government, given the very strong party leadership which was especially labeled as *mečiarism*, the opposition could hardly hope for traditional and regular parliamentary procedures to let its voice heard.

CONCLUDING REMARKS

This paper focuses on the interaction between the Parliament and the Government under the aspect of the usage and the weight of traditional parliamentary scrutiny tools compared to the newly developed skills and acquired experiences of MPs to address the Constitutional Court and to seek either the change of legislation or to stop unconstitutional behaviour. Constitutional Courts in East Central European countries were given important powers to interpret to what extent democracy goes hand in hand with the constitutional governance. Therefore even elected and representative parliaments have accepted the idea that their exclusive power to legislate, to guide the control of the government, to carry on parliamentary

procedures and general elections under the close watch of the constitutional judiciary, are limited. However difficult any general assessment might be, examples drawn from the leading rulings of Court in both republic show, that for the parliamentary minority (which is not always in opposition to the Government) addressing the Constitutional Court is rather an easy procedure and efficient in terms of the awaited results. The Court rulings on the legislation in conflict are binding and for the interpretation on the constitutional principles the Court enjoys rather high authority (which is not equivalent to popularity). Vote of confidence impact in general may not satisfy its authors for several reasons:

a) If taking the vote of confidence's objective as a tool to force the individual ministers or the whole cabinet to resign and to call early elections, it cannot be guaranteed for sure. Defeating the cabinet is not a direct way for the opposition to seek better prospects in the forthcoming electoral challenge. We have been witnessing that both in Slovakia as well as in the Czech Republic, the practice of interim cabinets when Prime ministers were to leave following the defeat in the House is better strategy,

b) The vote of confidence becomes a rigid and hard to put forward within the opposition as well as with the support of government dissenters, therefore either legislative initiative or legislative "invalidation" is used in order to challenge, to sanction, and to seek compensation in the Court,

c) The Court, when ruling the constitutionality of the parliamentary practice and procedures cares about individual rights of the Members of the Parliament, without necessarily balancing the meaning of the serving the mandate as serving the public office,

d) Under extensive individualistic aspect of protecting the rights and freedoms of the MPs, it is uneasy if not impossible to analyse executive-legislative relations upon parliamentary scrutiny criteria,

e) If parliamentary scrutiny in the whole is to be efficient, it should be considered in its unique parliamentary collective bargaining nature, developing and sharing common *esprit of the corps*, which is not possible without stable party faction structures,

f) Constitutional review (as briefly illustrated in the above cases) has already set up boundaries for perhaps popularly widespread illusions of parliamentary sovereignty. This trend is rather to be a continuous process. The Courts have already established their strong position *vis-a-vis* many of actors and especially towards the parliaments, when daring to go beyond the formal interpretation of the Constitution,

g) Therefore, calls for making Parliaments more important in their function of controlling the executive and other institutional actors, should take into consideration the growing impact of Justices on the Legislators' capacity to observe the "juridisation" of the representative mandates and of politics in general. However, the re-parliamentarisation enhances more areas than just the area of scrutiny.

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