Prof. István Stumpf

PARADIGM SHIFT IN CONSTITUTIONALISM

Importance of Sovereignty and Constitutional Identity

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Foreword

Shifting Sands at the Epicenter of an Earthquake – A Preface to 'Paradigm Shift in Constitutionalism'

It is not every day that a Professor asks a junior academic to write a preface to his work. (To some extent this shifted my view of the academic paradigms I have grown accustomed to in the past 15 years spent in legal academia.) Therefore, it is with the utmost pleasure that I have undertaken this creative task to write a foreword to István Stumpf's book, to which he gave the very provocative title '*Paradigm Shift in Constitutionalism*'.

If asked as a question, the title could be answered depending on what the subtitle encapsulates as '*The Importance of Sovereignty and Constitutional Identity*'. The answer to the question whether paradigms of constitutionalism are indeed shifting hangs on the weight one attributes to the importance of these somewhat "outlawed" concepts in today's post-sovereign world order.[1] These concepts signify a reliance on geography, geopolitics, history, culture and the role of the state and other local contextual determinants of these state systems.

To apply a geographic analogy, the Member States – and therefore the notions of sovereignty and constitutional identity (as well as essential state functions) – are the tectonic plates upon which the integration rests and upon which national (state) and supranational life organizes itself in all of those political and constitutional arrange-

[1] Skrbic talks about post-sovereign paradigms in constitution-making relying on the model of Andrew Arato, reimagining the Brexit process. See: Skrbic, Aristel (2020): Post-sovereign constitutional change. Critiquing and re-imagining the Brexit process. *Revus. Journal for constitutional theory and philosophy of law*, 41/2020. https://doi.org/10.4000/revus.6102

ments and structures that might be inherent to them.[2] As we know, once tectonic plates start shifting, we experience earthquakes, sometimes with devastating effects. It is unfortunately an analogy that is painfully fitting to some current European debates on constitutionalism. The European countries treated by the Author as examples for his argumentation (are forced to) stand at the epicenter of these earthquakes, while other argue they are the points of origin of the tectonic shifts that have shaken Europe in the past decade.[3]

In light of these arguments and based on the title of the book, the following questions immediately arise:

1) Did these Member-State tectonic plates start shifting as a result of attributing an increased importance to sovereignty and constitutional identity?
2) If it is so, as a result, what sort of fault-lines appear on the crust of integration and on that of the Member States' internal structures and political communities?
3) Do these 'tectonics' fundamentally rearrange the paradigms that we assign to constitutionalism on these levels?
4) If it is so, then is this normal or to be expected?

Firstly, I would like to reflect on the last two questions, but maybe we should first address what a paradigm is. In his seminal 1962 book, Thomas S. Kuhn, historian of science defined paradigms as notions that he took "*to be universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners.*"[4] Needless to say that the community of practitioners of the legal and political science of Europe and the nature of the integration have (had?) certain universally recognized achievements that served as model solutions for model problems, but what if there comes time where these model solutions no longer apply as the problems themselves are no longer of a "model character".

This train of thought is strangely similar to that of one theory of 'constitutional convergence', analyzed in detail by Eric Posner and Rosalind Dixon, whereby they argue that – in the abstract – converging constitutional change occurs when different superstructures (technology, demography, economy), i.e. deeper forces that shape a constitution, converge and by creating similar problems they necessitate similar solutions.[5] The idea inspired by Kuhn's definition puts this approach in reverse. If previously unseen problems no longer have a "model character", then the preexisting "model solutions" need to be rethought and reconceptualized. This is what leads to a paradigm shift, if not to the creation of an entirely new paradigm.

Another point made by Kuhn that might also support this view is that Kuhn's definition also incorporates another crucial point into the definition of paradigm, i.e. the temporal element expressed by the wording "for a time". What if there indeed came a time at the current stage of the European integration and in the life-cycles of the many Member States, where the previously known contextual determinants that have oriented model solutions to model problems are no longer are viable. What's more, what if this is nothing more than nature running its course. By nature, I mean, the (thus far known) nature of the integration and the responses to it by the constituent

[2] The verbiage here reflects on the wording of Article 4(2) of the Treaty on the European Union, which (re)ignited the sovereignty and constitutional identity debate after the entry into force of the Lisbon Treaty.

[3] Preferred academic narratives include: democratic backsliding or systemic violations of rule of law. I have also addressed some of these debates here: Sulyok, Márton (2021): Compromise(d)? – Perspectives of Rule of Law in the European Union. *Central European Journal of Comparative Law*, 1/2021, pp. 207–227. https://ojs3.mtak.hu/index.php/cejcl/article/view/6039

[4] Kuhn, Thomas S. (1962,1970): *The Structure of Scientific Revolutions*. Second Edition, enlarged. University of Chicago Press, 1962, 1970, p. viii. https://www.lri.fr/~mbl/Stanford/CS477/papers/Kuhn-SSR-2ndEd.pdf

[5] Dixon, Rosalind – Posner, Eric (2011): Limits of Constitutional Convergence. 11 *Chicago Journal of International Law*, 399 (2011), pp. 401–402. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4468&context=book_chapters

entities, but we can also delve into theories regarding the nature of the political elites in power on both levels: state and supranational.

After this introduction, I would like to comment on the different topics addressed by the Author, along the lines of the first two questions mentioned above. I myself have written extensively on many aspects of what he chose to include in this collection, so I don't feel estranged from the subject matter.

In the context of things shifting, Mary Dobbs talks about the "shifting battlegrounds" of Article 4(2) TEU when analyzing what the concept of 'constitutional identity' might mean for the EU and the Member States of EU. Dobbs argues that "[t]*he goal here is not to prevent the Member States from protecting their existing national identities, or indeed to backtrack and avoid acknowledging the legal scope or force of Article 4(2) TEU. Article 4(2) TEU represents an important card in the Member States' hands in the delicate balancing act between the effectiveness of the EU on the one hand and the Member States' sovereignty in essential or fundamental areas on the other.*"[6] She also talks about how this might encourage and benefit judicial dialogue and resolve emerging tensions while not aiming at creating outright conflict.

The now infamous PSPP-judgment from Karlsruhe, from the Federal Constitutional Court of Germany, was (mis)interpreted in a way that resulted in at least a perceived outright conflict between Germany and the EU institutions. In reflecting on that decision, I have taken to the work of Hans Lindahl and Kaarlo Touri, analyzing the fault-lines between the national and EU legal systems. A cumulation of their thoughts was best echoed by Oliver Garner, who argued that these fault-lines are indicators that emerge "*between what a collective can order – the orderable – and what it cannot order – the unorderable*".[7]

[6] Dobbs, Mary (2015): The Shifting Battleground of Article 4(2) TEU: Evolving National Identities and the corresponding need for EU management? *European Journal of Current Legal Issues*, 2(2015) https://webjcli.org/index.php/webjcli/article/view/395/560

[7] Garner, Oliver (2017): The Borders of European Integration on Trial in the Member States: Dansk Industri, Miller and Taricco. Editorial. *European Journal of Legal Studies*, 2(2017), pp. 1-12, citation from p. 6. https://cadmus.eui.eu/bitstream/handle/1814/46065/EJLS_2017_EditGarner237UK.pdf?sequence=1&isAllowed=y

Constitutional courts are (or at least were) such constitutional actors that have a constitutional mandate to protect the collective and its constitution against the unorderable. To set boundaries, (counter) limits and prevent the creation of fault-lines in protecting the constitution and the constitutional order created, and the collective (community) protected by it, and they shall keep doing so in maintaining the internal balance of the national legal order also in the face of EU law.

It is thus not surprising that in his first essay on '*Paradigm Shift in Constitutionalism*' – the namesake of the book –, Stumpf writes about the role and function of constitutional courts and how this role changing is embedded into a shift (then change) of paradigm in terms of constitutionalism. All this placed into the broader context of current Hungarian and Polish debates, from a point of view that looks at possible overreach by these courts and the 'struggle for legal and political constitutionalism' – notice the shift in paradigm already in this approach. He argues that these courts had a pivotal role at the time of the transition in the 1990s, and then after 30 years of functioning have met harsh criticism in the form of legal and political challenges from the new political majorities in these countries. He then asks the questions whether this signals a paradigm-shift regarding the concept of constitutionalism or rather a democratic decay? In turn, he ponders upon the 'proper attitude' of a constitutional court in this climate and upon the responsibility of these courts in the escalation of this situation.

In Alexander Bickel's 1962 book[8] the *raison d'être* of constitutional courts was framed by what is now commonly referred to as the 'countermajoritarian difficulty' or dilemma: "*The legitimacy of the constitutional adjudication of legislation has been a mainstay of constitutional scholarship. The challenge is this: if democracy is understood as entailing*

[8] Bickel, Alexander M. (1962): *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Yale University Press, 1962.

the making of new rules by popularly elected representatives, how does that square with a court that lacks a similar sense of public accountability being able to overturn the decisions of those representatives for failing to pass constitutional muster?"[9]

In this context, the Author also touches upon the '*Power Shift between the Parliament and the Constitutional Court in Hungary*'. This ties back to an age-old debate on what American constitutional law scholar Mark Tushnet called 'constitutional hardball'. In his original work introducing the concept, he characterized Marbury v. Madison (which we in Europe often call 'the very first decision of constitutional justice') as an instance of constitutional hardball. In a very thorough and exhaustive introduction of the historical context and circumstances of the case (hereby omitted for obvious reasons), he goes on to say that in making the decision, "[Chief Justice John] *Marshall made the stakes high by treating the case as one implicating the power of the courts, the last bastion of Federalist control, to supervise the other branches, controlled by Jeffersonians.* [...] [He] *managed to establish the power of the courts to control the other branches in a decision that it impossible for Jefferson to fight back directly.*"[10]

Due to reasons largely similar to what fuels critics of 'judicial governance' in the United States, Stumpf argues in the book many times that – at least in Hungary – the political critics of legal constitutionalism voiced opinions of a judicial *coup d'état*, thereby restricting

[9] Many issues in this regard are analyzed by Maartje De Visser: *Constitutional Courts Securing Their Legitimacy – An Institutional-Procedural Analysis*. In Bogdandy, Armin von, Huber, Peter, Grabenwarter, Christoph (2021) (eds.): Handbuch Ius Publicum Europaeum Band VII, CF Müller, 2021, pp. 291–331. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507238

[10] Tushnet, Mark (2004): Constitutional Hardball. *John Marshall Law Review*, 2(2004), pp. 523–553, citation from p. 543. https://dash.harvard.edu/bitstream/handle/1/12916580/Constitutional%20Hardball%2037%20J.%20Marshall%20L.%20Rev.%20523%20%282004%29.pdf?sequence=1&isAllowed=y On the contemporary American debates in this domain, see: Finkin, Joseph – Pozen, David E. (2018): Asymmetric Constitutional Hardball. *Columbia Law Review*, 3(2018), 915–982. https://columbialawreview.org/wp-content/uploads/2018/04/Fishkin-Pozen_-Asymmetric-Constitutional-Hardball.pdf

the latitude of the Legislative and the Executive, who – in a special system of separation of powers are merged together – and power between them is divided. These critics are – according to the Author – who demand a return to governance by elected officials, because the supporters of political constitutionalism are convinced that:

(i) these courts have outgrown their usefulness as 'constitutional counterweights'; and
(ii) democratically elected legislators are more legitimately able to solve all problems caused by what he calls "reasonable disagreements"" within society.

To my mind, this second argument resonates greatly with Bruce Ackerman's theory on 'constitutional politics' paired with the state of 'constitutional disharmony' put forward by Gary Jeffrey Jacobsohn in his work on constitutional identity. 'Constitutional politics' supports arguments shifting power from the court to the legislature as the concept relates to "*the series of political movements that have* [...] *tried to mobilize their fellow Americans to participate in the kind of engaged citizenship that, when successful, deserves to carry the special authority of We the People* [...]".[11]

Of course, in a heightened state of 'constitutional politics' obviously public discourse increases on many politically sensitive issues in a society, thereby dividing it, and the institutions of constitutional justice, e.g. constitutional courts, are left to solidify the prevalent value choices. However, society might also be disharmonic regarding what the constitution "holds dear" and then controversies regarding its values and identity dominate public discourse, dividing the electorate, thus being channeled into a heightened state of 'constitutional politics'.

[11] Ackerman, Bruce (1989): Constitutional Politics/Constitutional Law. *Yale Law Journal*, 3(1989), pp. 453–547, citation from p. 462. https://bit.ly/3zONoEs

In both scenarios, in the established systems of Kelsenian constitutional review (i.e. the Austro-German model applied e.g. in Hungary as well), the constitutional court is definitely such a constitutional actor, which needs to be 'put in its place' by those in support of political constitutionalism and those in favor of the arguments that these course have crossed a red line, and – according to those cited by Stumpf – "are deemed to threaten constitutional democracy." This might be true to the extent that the essay on '*A Powerful Court, the Court of the Power*' argues in reference to Epstein and Segal that "the total politicization of judicial selection has eroded its political legitimacy and social acceptance."

In other words, these apex courts are in crisis – at least in the national contexts examined by the Author –, and it is in this realm, where he elaborates clearly, concisely and succinctly on the power shift between the parliament and the constitutional court in Hungarian terms. Regarding such a shift, Stumpf also sheds light on a "joint responsibility [of these two actors] in safeguarding national sovereignty and constitutional identity, which opens a new dimension in separation of powers".

This "joint responsibility" brings to mind another debate in American constitutional/administrative law, that focuses on novel approaches to the concept of separation of powers. As American constitutional law scholar Ilan Wurman argues, in some cases it is "*too hard to classify as legislative, executive, or judicial, such that enforcing the separation of powers is impossible. It would be better to move beyond these conceptions of formalism and functionalism and orient our thinking around exclusive and nonexclusive powers.*" In an admittedly originalist approach he holds that many aspects of governmental power are by nature nonexclusive as they may be manifestations of a combination of legislative, executive and judicial acts. "*If functionalism is concerned with identifying the "core" functions of the three branches, the reorientation proposed here would require identifying "exclusive" functions. The central question, however, is [...] whether a function is or is not within a category of exclusive power as a matter of text, structure, and history. But this approach rejects the proposition associated with formalism that power must always be categorized as exclusively legislative, executive, or judicial.*"[12]

This only proves that in systems that have historically, or due to organic development (paired with a rationale to ensure efficiency of the exercise of public power) fused or merged certain aspects of legislative and executive power, especially in almost all European parliamentary forms of government, the correct positioning of apex courts in charge of constitutional justice is not an easy task, and it should not be taken lightly. Stumpf provides insightful remarks for the understanding of these issues in both American and Hungarian terms.

In another essay on '*Political Institutions and the Formulation of the Constitution*', the Author takes on the commentary of the Hungarian aspects of the principle of division of power in the context of the new Fundamental Law. He mentions that vertical and horizontal models of division conventional in the US are not typical or weak in terms of Hungary as a unified state. Making a comparison of the constitutional regulation of the legislative power, he arrives at the conclusion that "*the only significant entity that can offset the power of legislation is the Constitutional Court*", who – not only in the abstract – enforces the principle of division of power through its case-law.

In this effort, the Author also describes the bare essentials of constitutional review in the Hungarian mold and talk about rules of legal interpretation, with emphasis on the rule that requires constitutional interpretation be done teleologically, in light of common sense and in light of the "achievements of the historical constitution". At this point, the American debate about textualism and originalism appears into the essay, regarding which Lee Strang recently wrote a comparative analysis between the US originalist and the Hungarian "achievements" method by concluding that despite the many substantive and

[12] Wurman, Ilan (2022): Beyond Formalism and Functionalism in Separation of Powers Law. *Minnesota Law Review*. Forthcoming, 2022. citations from p. 1. of the online manuscript. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4052001&fbclid=IwAR2s1ihr3272bwH16tSjsizYdbqRMlcCr8mCfmdaPHvFdxdOJSvz7PG6Dpc

functional differences between the two, "*sociologically, both tie their respective constitutions to the nations' foundational origin and history.*"[13] (Stumpf also ponders upon what these achievements are in other essays in the book.)

History (necessary to understand the Author's opinions regarding Hungary's constitutional development leading up to challenges faced by the Fundamental Law) is a steady and constant frame of reference that the Author uses diligently to provide further context to explain his insights. For instance, in the essay on '*Sovereignty, Constitutional Identity and European Law*', his point of view is largely guided by the statement that one can look at the Hungarian constitution and its identity in broader historical dimensions and that a "*historical perspective gives a greater sense of continuity to certain constitutional institutions and underlines the power of the state to preserve the nation*", thereby referring to a provision in the Fundamental Law containing this exact statement.

Preserving the nation has proven a legal, political and constitutional challenge during the unexpected and unforeseen dimensions of change brought about by the COVID-19 pandemic. To borrow a part of Bertrand Mathieu's 2013 book. '*Rien ne bouge, mais tout change*'[14] – 'Nothing moves, but everything changes'. For the better part of the past two years, the world has become a place where nothing moved but everything changed. This period will go down in history as something that might – permanently – erode the perception of certain constitutional institutions, but at the same time it also affects their resilience and efficiency in handling extraordinary, emergency situations, or, expressed in the jargon of the Fundamental Law: situations of special legal order.

[13] Strang, Lee (2021): A Comparison of the Historical Constitution and Originalism. Appearances May Be Deceiving. 9 July 2021. *Constitutional Discourse*. https://www.constitutionaldiscourse.com/post/lee-j-strang-a-comparison-of-the-historical-constitution-and-originalism

[14] Mathieu, Bertrand (2013): *Constitution – rien ne bouge, mais tout change*. Lextenso Editions. LGDJ, Paris, 2013. https://www.lgdj.fr/constitution-rien-ne-bouge-et-tout-change-9782359710830.html

The Author addresses many of these above issues in the essay on '*COVID-19 and the Rule of Law*', highlighting the erosion and eventual demise of the liberal world order and Pax Americana. On a note adjacent to efficiency and resilience, he talks about the "rediscovery of the state", and those "essential state functions"[15] (and their local, contextual determinants) without which the survival of populations would be brought into question. Stumpf aptly observes how certain relationships between constitutional institutions have been reshaped, and in this context circles back to arguments made elsewhere in the book regarding (i) the power shift between parliament and constitutional court (this time under these exigent circumstances); and (ii) the legitimacy of constitutional courts being brought into question in general, in light of the many constitutional challenges brought against emergency legislation affecting the enjoyment of certain fundamental rights. On occasion, previous references to political constitutionalism also resurface, elegantly linking the essays and their train of thought together.

COVID-19 has obviously created further hurdles for the nation states in technological and economic terms as well, and this latter context – although in a pre-COVID setting – is treated by the essay on '*Current Issues on Economic Legislation*'. This is a terrain that has created significant echoes internationally from the time of the adoption of the Fundamental Law of Hungary in 2011, because it is relevant to the power shift between parliament and constitutional court and the ensuing curtailment of the then existing powers of the Constitutional Court to review economic legislation with certain few key exceptions. Stumpf himself is rightly critical of these restrictions in line with mainstream academic public opinion, but in his focus on specific cases from Hungarian constitutional jurisprudence – from his time at the Court – he examines key issues of economic policy and public interest.

[15] A term also mentioned by Article 4(2) TEU and therefore greatly relevant to all debates on constitutional identity.

It has been widely reported that certain economic considerations have motivated the Hungarian constitutional legislator to redefine the relationship of Church and State, but Stumpf only addresses some of these questions specifically. In the essay titled '*State and the Churches in view of the Constitutional Court's Decisions*', the Author rather focuses on a historical overview from 1989 until the first years of the Fundamental Law after its entry into force in 2012. The very detailed introduction of the Hungarian "cooperative separation" model (for the service of community goals, such as education or public health) refined and solidified by the Fundamental Law is an interesting read for all of those who are familiar with the concept of the "Jeffersonian wall" that exists in the United States between these two realms.

It is possibly not without reason that the essay '*Invalidity in Public Law as a Measure of the Quality of Legislation*' was placed in this part of the book. As described by the Author as well, the Act C of 2011 on the right to freedom of conscience has been declared 'invalid in public law' by the Constitutional Court due to non-compliance with the formal (technical) rules of the legislative procedure. This competence of the Constitutional Court serves the purpose of overseeing legislation for compliance with constitutionally anchored, rule-of-law standards of legislation and to prevent 'errors of haste'.

Despite the fact that the Court was not granted the power to review constitutional amendments as to their content (given an argumentation focused on separation of powers), this competence can be exercised not only in the case of 'ordinary legislation', but also in terms of constitutional amendments as to their compliance with constitutional requirements of constitutional legislation. Stumpf talks of a "watershed moment", giving rise to many domestic and international criticism when through the widely debated Fourth Amendment to the Fundamental Law, the Court was expressly forbidden to review the substance of amendments. And just like that, we are back to where we started this Preface: with debates about shifting paradigms in constitutionalism.

Regarding the constitutional review of constitutional amendments, world-famous comparative constitutionalist Yaniv Roznai

talks about his 'paradigmatic jurisdiction' of Israel "*as one in which the practice of judicial review is recognised, although analytically at least, judicial review of amendments can be exercised even where judicial review of ordinary legislation is not recognized.*"[16] It is obvious that there are many different solutions to choose from when we think about how to reconceptualize and rethink certain paradigms of constitutionalism with the change of times, if we abide by the definition introduced for the concept by Thomas Kuhn, mentioned in the introduction.

By being forced to rethink our "model problems" due to unforeseen changes in global climate, economy, health, industry, politics and law, we are forced outside the box in search of novel "model solutions". Thus, our paradigms might naturally shift in this process, but not all shifts are harmful. Roznai's compatriot, Binyamin Blum, argued that among the many avenues of constitutional convergence treating common problems with common solutions, we shall also be mindful of the fact that „*[a]dopted doctrines must be adapted to suit local conditions*."[17] In "*High Courts in Global Perspective*", Garoupa and Bagashka also talk how factual conclusions can only be drawn in light of a deep understanding of contextual determinants.[18] Garoupa, along with Tom Ginsburg, already talked about this in the context of how constitutional courts build their reputation. They argue that the model's application (and perception) in different countries is highly

[16] Roznai, Yaniv (2014): *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*. LSE Doctoral Theses, 2014, p. 173. http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf

[17] Blum, Binyamin (2010): Doctrines Without Borders: The New Israeli Exclusionary Rule and the Dangers of Legal Transplantation. *Stanford Law Review*. 60(6)2010:2131-2172, citation from p. 2172. http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2010/04/Blum.pdf

[18] See: Bagashka, Tanya – Garoupa, Nuno – Gill, Rebecca D. – Tiede, Lydia B. (2021): Constitutional Courts in Europe: Quantitative Approaches. In Nuno Garoupa – Rebecca D. Gill – Lydia B. Tiede (eds.): *High Courts in Global Perspective (Evidence, Methodologies and Findings)*. Virginia University Press, 2021, esp. 186–199.

dependent on local conditions and circumstances.[19] However, times as well as circumstances change differently in different parts of the world.

We should not forget this, when reading this book with an open mind, which – through some snapshots of Hungarian, Polish, European and American constitutional law and politics – tries to shed light on this universal truth. The Author has lived for a while now at the epicenter of the earthquake of current debates about our shifting paradigms in constitutionalism. He might navigate in shifting sands, but his vision seems to be unburdened by the constant change.

Budapest, 25 April 2022 ("The Day of the Fundamental Law")

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[19] Garoupa, Nuno – Ginsburg, Tom (2011): Building Reputation in Constitutional Courts: Political and Judicial Audiences. *Arizona Journal of International and Comparative Law*, 3(2011), pp. 539–568, esp. 540. https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1477&context=facscholar

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