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17 Constitutional courts under pressure – An assessment

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Introduction

If we look at the legal systems of the countries discussed in this book, many doubts can be raised as to whether any comparison may be made between them. They operate in different constitutional contexts, they belong to different legal cultures, and they must face various challenges, or the same challenges in different ways. Even the same constitutional courts rarely deal with the same questions, which makes any comparison difficult. Furthermore, the study of the practice of the European courts introduces new elements to the comparison, since they do not operate within a nation-state framework, and their primary function is not the judicial review of legal acts. Hence, because of this, it is important to clarify what the basis for the present comparison actually is. As we showed in the introductory chapter, our work deals with the major trends in constitutional adjudication, seeking answers to questions whether the contemporary challenges, that frequently put unusual or even unprecedented pressure on the courts, trigger changes in constitutional jurisprudence or not. That is, whether or not these social developments have led to the replacement or thorough modification of previously established judicial constructions and interpretive practices. In other words, the judicial strategies are the focus of our attention. We think that these strategies can rationally be examined and the constitutional imprints of the crisis situations in the various legal systems (including the European legal regimes) can be compared with each other.

However, due to the lack of objective criteria for the measurement of changes in judicial responses to different challenges, it is impossible to create a ranking between the examined countries based on a scale or extent of changes. Still, the occurrence and directions of changes can plausibly be exhibited and evaluated by qualitative analysis and comparison of the old and new judicial practices.

In analysing the national situations as they have been described in this book, we found that a simple three-variable scheme assumed on a strictly logical basis can provide a more or less suitable analytical framework for identifying and instantiating the contemporary major trends of European constitutional adjudication, even though not all cases can be classified in these categories. The latter will be discussed separately below as ‘special cases’.

The first group includes those countries where constitutional jurisprudence has changed significantly in the areas affected by the challenges described above. The opposite stance is the stability/continuity of the judicial practice as far as constitutional review is concerned. And there is an intermediate position that can be characterised by moderate changes and the co-existence of the old and new concepts and designs. In this regard, we repeat that constitutional practice, including the jurisprudence of the competent courts, is developing in every legal system. Even a rich and well-established jurisprudence cannot give solutions to every case, as the continuously changing conditions of social life demand new and adequate answers from the courts. Thus, 'stability' in the context of this work means the relative 'unchangingness' of the mainstream constitutional jurisprudence that preserves the previously developed legal constructions, judicial attitudes and conventional paths of adjudging constitutional controversies. Conversely, in our understanding, 'changing' jurisprudence does not mean that all elements of constitutional adjudication have changed. Even the most fluid or versatile practice cannot dispense with certain structural and procedural continuity (without the serious risk of losing trust or legitimacy). Consequently, there are no rigid frontiers between these categories, as the positioning of the particular countries or legal systems is also relative and selective. While a constitutional system may preserve its fundaments inasmuch as the protected sphere of privacy is at stake (in domestic security issues, for instance), it can vary when reacting to the legal problems of migration, etc.

1. Constitutional responses to challenges – Major judicial strategies

1.1 Changing constitutional jurisprudence

As to the first category, among the countries we have examined, France and Spain have changed the constitutional jurisprudence to the greatest extent. In France, as Hourquebie claims, the Constitutional Council (*Conseil Constitutionnel*) has taken into account the 'reality' both in inland security and social welfare cases, which has led it to adopt a 'pragmatic' approach in its jurisprudence.[1]

It is to be noted, however, that in both countries the constitutional court had to face and resolve unaccustomed problems. In France, shocking terrorist attacks put huge pressure not only on the legislature and the government but also on the Constitutional Council in adjudicating the constitutionality of the anti-terrorism legislation, and, indirectly, to upkeep the 'fundamental laws of the Republic'. These fundamental laws were at stake when the deprivation of nationality as a sanction against terrorism was suggested, which concerned directly such substantial liberties as the equality or the right to citizenship. In some controversial issues – for example, the ban on the wearing of headscarves or the concealment of the face in public space – unprecedented legislative measures were adopted in the protection of public order, and the *Conseil Constitutionnel* had to establish a new balance between the freedom of religion and the public security interests.

The Spanish Constitutional Court (*Tribunal Constitucional*) has also developed a special 'crisis jurisprudence' in those areas affected by major challenges. Although the Constitutional Court expressed quite early that "[t]he objective of guaranteeing the security of the constitutional State at any cost, via preventative controls, puts the constitutional State itself seriously at risk",[2] the social climate that has surrounded the fight against terrorism has influenced the relating practice of the Court. It is particularly interesting, as this country has had experience in this regard. As far as foreigners' rights are concerned, the previous constitutional doctrine imposed the obligation upon the legislature to respect the substance of fundamental rights. On this basis, the core area of the basic rights should have been extended to foreign citizens in an equal way as they are applied to Spanish citizens. However, as Balaguer Callejón reports,[3] the Constitutional Court has accepted the government's policy to make a difference between the immigrants on the basis of their authorisation to stay or reside in Spain. So, this interpretation breaks the coherence of the Court's earlier way of argumentation to place certain rights on the basis of human dignity and the 'essential content' doctrine. In this way, the Court has enabled the Government to grant different rights and entitlements to the various groups of immigrants.

In the constitutional review of the laws related to the economic crisis, the Spanish Constitutional Court practically confirmed all policy measures of the other branches of government. According to Balaguer Callejón, discovering the 'economic interpretation of the Constitution', the Court has shown strong deference to policy choices and has not afforded due consideration to the constitutional impacts of austerity measures, in so far as social rights have been interpreted from the perspective of the requirements of balanced budgets and economic austerity, and certain principles and rights have been subject to financial considerations.

In Spain, the secessionist efforts in Catalonia mean a special challenge to the constitutional system of high account. In this area, the jurisprudence of the Constitutional Court has not been very mutable compared with the previous practice, as its very recent decision on the Catalan independence referendum shows..

1.2. 'Swinging jurisprudence' – between continuity and change

As mentioned above, in a lot of countries the outcomes and major directions of constitutional adjudication show igns of both continuity and change. It means that although in some areas the Constitutional Court has developed new doctrines in response to crises, in other respects it can be characterised by continuous practice preserving the validity of the earlier constructions and interpretive patterns.

Greece is a great example of this, because this country was hit by an extremely extensive economic crisis affecting almost all areas of social, political and economic life. As Vlachogiannis reported, nothing has remained unchanged, and this has generated new and rich constitutional case-law. Here the stability of the old constitutional principles and values, as well as the fortitude of constitutional judges, has been tested on a number of occasions. The Supreme Court, which has the power of constitutional review of legislative acts, started from the theoretical basis

of a 'holistic interpretation' that has provided a sufficiently flexible tool for the body to keep a room for manoeuvre in each controversial issue. The principle of proportionality, as a frequently used judicial instrument, has also offered a desirable flexibility: although it is well-established interpretive method, it has not been applied in the same way as before. This theoretical and methodological background made it possible that 'the Court has oscillated between, on the one hand, reaffirming well established doctrines, on the other hand, introducing in its legal reasoning the concept of "emergency situation"'.[4]

However, this variation of adaptation and maintenance of previous practice was not a persistent judicial behaviour. In the initial stage of the economic and financial crisis, the Court showed a deference to the Government austerity policy, discovering new and less stringent constitutional standards, like the concepts of 'decent living standard' (allowing restrictions on personal incomes and allowances), 'core of the state' (legitimising new Government functions and empowerments), or reshaping its earlier approaches, like the extended use of the concept of 'general interest' (of which the category of 'budgetary interest' was deduced). While many objected this frequent recourse to emergency laws, the Court often 'failed to protect adequately certain rights', like property rights or equality.[5] At the peak of the judicial self-restraint, the 'public' or 'general interest' emerged with so great a weight in the justification of Government measures that it seemed to trump every individual right. It is an extreme position in relation to the stability/change dichotomy; if there is a danger of the collapse of the national economy so that is the survival of the state is at stake, any device is allowed to be used that is necessary to avoid this cataclysm. Just because of this approach, Greece should be included in the group of those countries where constitutional jurisdiction rapidly changed when the crisis management laws were on the agenda of the judiciary. However, as time has passed, and the efficiency of crisis management became more and more questionable, the attitude of the Supreme Court also altered towards the crisis-led legislative initiatives. As Vlachogiannis claims, the Court 'has inaugurated an era of strong form of judicial review of socio-economic legislative measures, extending the scope and increasing the intensity of the control exercised'.[6] This shift comprised, among others, the creative interpretation of some constitutional provisions in order to defend certain constitutional values, or the adherence to stricter justifications of restrictive social policy measures instead of complacency with a plain reasonableness.

On the imaginary 'continuity/change' scale the next country is Italy, where the Constitutional Court (*Corte costituzionale*) has showed different levels of rigidity in its legal acts on the various issues of crisis management. As we saw from Ciolli's study, although the Court succeeded to maintain its earlier level of rights-protection, even for immigrants, it upheld some unusual legislative pieces in the area of the fight against terrorism. The effective control over public expenditure proved to be the upmost argument in the course of constitutional review of the regulatory power of the legislature and the Government. Although the Court could lean on the solid foundation of the principle of 'balanced budget' that had been just introduced into the Italian Constitution, sometimes even the retroactive nature of statutory regulation was not enough to declare a law unconstitutional.[7]

Besides all this, Italy belongs to the group of countries where the Constitutional Court has had to face quite special challenges. One of these was the sensitive relationship between the Parliament and the Government, and the point was how the Court would adjudge the shift of balance toward the executive power. It seems that the Court did not impede the development of the 'presidentialisation' of the Government, though the constitutional context had not changed in this respect. The *Corte costituzionale* supported also the central Government's efforts to strengthen its own power *vis-à-vis* the regions, albeit the restructuring of the vertical division of power has taken place without constitutional change. Ciolli's study shed light on a special challenge to the decentralised government structure of Italy which has been tested by the economic depression, as the successful crisis management demanded the centralisation of resources and competences at the expense of the regional governments.

Portugal was also severely hit by the negative effects of the world financial crisis. Some constitutional issues emerged from both the national economic stability and growth policy and from the international bailout programme. These challenges to the Portuguese constitutional system were special in two respects. First, the economic and social rights are considered full-fledged fundamental rights in the Constitution, rather than mere state aims providing general guidelines or policy purposes for the government. Second, Portugal was in need of international financial aid, the conditions of which were determined by external actors, namely, the so-called *Troika* (consisting of the European Commission, the European Central Bank and the International Monetary Fund). In addition, these economic and financial requirements were set more or less in a loose, political form. Incidentally, the proposed and applied tools aiming at economic and financial recovery were typical and well-known restrictive measures – from pay-cuts of public sector workers to curbing social and welfare services.

While, as Canotilho argues, the Constitutional Court was frequently criticised for its 'unprecedented judicial activism' as well as for, in some cases, its unpredictable and illegitimate practice, the Court invoked certain constitutional values such as equality or legitimate expectations, which proved to be sufficiently strong in defending individual rights. Probably, the major ambition of the Constitutional Court was to find compromise solutions when budgetary interests collided with individual claims for social rights. This attitude was manifested, for example, when the Court repealed the law imposing an additional pay-cut on public employers, but only with *ex nunc* effect, which meant that the contested recovery measure could prevail for some time. This special 'yes–but' approach is also reflected in it upholding some controversial legislative acts, but only under special conditions; such as the temporary effect and exceptional nature of these measures causing only proportional rights-limitations. Economic crisis management inspired the development of new judicial constructions and case-law concerning for instance, the proportionality review, the content of legitimate expectations or the 'essential core of minimum guarantees [for social rights]'. Basically, the Court has recognised a wide discretionary power of the government to determine the way and instruments of crisis management without renouncing the protection of the rights of those

people who, in part as a consequence of the economic crisis, are in the worst financial situation. As well as these developments, Canotilho also emphasises that 'the Court mainly followed its previous paths and methods, as well as some of its most important jurisprudential lines'.[8]

1.3. Preferring stability and continuity in crisis-related jurisprudence

Obviously it can be safely claimed that the real question is not whether the constitutional jurisprudence has changed as a result of the global challenges in the various European countries, but how much change has happened, or what kind of adaptation has been achieved. Within this framework, the results of our research show that some national courts succeeded in preserving their previously developed standards and doctrines and found that the new challenges can be effectively managed by the established practice and case-law. Certainly, it does not mean that the continuity of jurisprudence would have prevailed in all cases or areas.

In Gardasevic's report on Croatia it is argued that the Constitutional Court has not significantly departed from its own previous case-law. As Gardasevic concluded, the 'constitutional protection of fundamental rights and freedoms in Croatia in the past 15 years has constantly been evolving in a way as to give those rights a position of judicially enforceable constitutional rules', which suggests an unbroken practice. It is reinforced by the finding of this study that in contrast with the real war situations in the early 1990s, when 'the Court showed extreme deference to emergency measures', in the cases relating to domestic security in recent years, it took a different position.[9] The Court insisted, for example, to upkeep the traditional proportionality review even in cases of 'state measures for prevention and suppression of terrorism' [striking down a law limiting the freedom of assembly for such reasons]. However, we must be careful in assessing the relevant achievement of this Court, as some of the new-generation security measures have not been brought before the body. Therefore, the situation in this field, as Gardasevic says, is 'far from clear and any general conclusion on how the Court could really act in future cases of imminent and serious threat to the constitutional order might be quite premature'.[10] The Court, then, seems to apply a 'process-based' approach concentrating mainly on procedural matters, rather than proceeding with substantive reviews.

As to the economic crisis, the Croatian Constitutional Court has made it clear that the 'social state', 'social justice' or 'social rights', even they appear in the constitutional text, are only policy guidances for the legislator and do not enjoy special protection.

All in all, though the Constitutional Court did not have to make significant changes in its crisis-related practice, the main reason for this relative continuity was that the constitutional foundations offered enough room for it to respond to the new challenges after the war experiences of the country, and the original low constitutional rank of social rights.

All signs show that the jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*) has changed the least with regard to the crisis-led

legislation in the countries we have investigated in this book. As it is well-known, this Court has developed an extremely rich case-law and has some experience concerning certain challenges from the past, like terrorism and migration, which are such acute problems today. The recent jurisprudence of this Court is also interesting because it has had to face a similar problem brought about by economic crisis as its Portuguese and Greek counterparts, though from a different point of view. The Federal Constitutional Court had to adjudge the constitutionality of 'rescue packages' that provided financial assistance (mainly credits and loans) to some EU member states that found themselves in a difficult budgetary position. However, Germany stood on the creditors' side, and from this one could conclude that the German Constitutional Court had to resolve basically different constitutional problems than the courts of the countries that as debtors had been beneficiaries of these recovery programmes. Despite this, in Germany too, the core issue was the protection of national sovereignty as well as the major properties of the democratic decision-making process. More specifically, the constitutional issue concerned the scope of the *Bundestag*'s budgetary rights in relation to financial transactions whose content was defined by international institutions. The Court held that any transfer of the budgetary powers of the lower house of Parliament is constitutional only if the *Bundestag* has the opportunity to control the process that imposes financial obligations on Germany. In doing so, the Constitutional Court rejected the idea that the necessity demands extraordinary solutions or rules. As Mehde stresses in his chapter, it was 'almost unthinkable that the Court could explicitly distance itself from previous judgements'.[11] He sees in the present case-law the uninterrupted continuation of the practice followed since the Maastricht decision of the Court in 1993. Although the Constitutional Court has not dealt with every conceivable problem, the well-established necessity–proportionality test was used also for the case on the constitutionality of an anti-terrorism-data-gathering system. Maybe the only real innovation was that the Constitutional Court in a case – the first time in its history – asked for a preliminary ruling of the European Court of Justice, but this in itself can hardly be regarded as a disruptive change in jurisprudence.

1.4 Special cases

1.4.1 National pathways under special reasons

There are some countries that cannot be clearly classified into any of the three groups. It is a great temptation to suppose that the relevant constitutional jurisprudence of the United Kingdom should included in the second class where the judicial practice fluctuates between change and continuity depending on the nature of the case before them. However, the jurisprudence of the British courts germane to the crisis-related legal acts cannot be characterized as being 'intermediate' or 'halfway' on the scale from continuity to transformation. Birkinshaw's study argues that in the areas of foreign, defence and security policy the British courts can be characterised by deference to executive expertise in choosing the

best policy solutions, and they are reluctant to intervene in decision-making process when 'general interest' is invoked. One can easily get the impression that the courts are steadily retreating in reviewing the antiterrorist legislative acts, which means that they give green light to more and more extension of government influence over privacy, and give up some traditional positions in the area of police and secret service investigations.

If in the UK the judicial practice is constantly changing in domestic security issues, McEldowney's study reveals that the British courts persist in their distrust of the supremacy of the European human rights law. As he claims, the jurisprudence of the European Court of Human Rights and the European Union law have challenged 'the UK's constitutional orthodoxy',[12] creating a dilemma between the traditional principle of parliamentary sovereignty and the claim for primacy of the European law. This leaves its stamp on the judicial review as well. McEldowney argues that one of the motivations behind Brexit could be to regain UK sovereignty, which prefers judicial deference to policy making having basically political nature. Eventually, whereas the judicial practice on antiterrorism legislation has gradually changed in recent years, the traditional deference of the courts to the inherent autonomy of political branches in policy making will probably win in the long run.

The Hungarian and the Polish examples belong to the special cases for conspicuously different reasons. While the jurisprudence of both of the Hungarian Constitutional Court (*Alkotmánybíróság*) and the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*) in crisis-led cases show many similarities to the decisions and solutions of other constitutional courts, the most important issues have not had precedents to be compared with. Although both courts have had rich experiences in dealing with temporary and unprecedented situations (think of the constitutional challenges of transitional justice after the fall of Communist regimes in these countries), their jurisprudence was not as wide-ranging, diversified and elaborated as in those countries where the constitutional review has much longer traditions.

The comparison of the jurisprudence of the Hungarian Constitutional Court with the practices of other courts is difficult, because the competence of the Constitutional Court has been reduced nowhere else in the way as it was reduced in this country. The special reason is the harsh reduction of the power of the Hungarian Constitutional Court, namely the abolition of the Constitutional Court's power to review the constitutionality of public finance laws. Although the Hungarian Constitutional Court had elaborated in detail the constitutional requirements of public finances in the 1990s, due to this power reduction the Court has not been able to enforce them against the political will of the parliamentary majority in recent years.

Still, there are some legal areas and constitutional issues where we can compare previous and new practices. In doing so, we can observe judicial deference to the executive power in handling crisis situations. For example, the balanced budget has proven to be a major public interest in both countries and which was considered sufficient justification for extensive state intervention in the sphere of economy and property rights. This is especially true in Hungary, where there was a

significant reduction in the level of protection of fundamental rights and the rule of law compared with the previous jurisprudence. As a result of the curtailment of the Court's jurisdiction and the court-packing replacing the old judges with new members who are loyal to the Government, the Constitutional Court became a quasi-Government agency usually providing formal legitimacy for the Government's will.

Besides the difficulties of comparison, the other reason why Hungary and Poland cannot be classified as countries where constitutional jurisprudence of crisis-related legislative acts has significantly changed in the past few years is that the changes of case-law were not really motivated by the responses to the challenges examined by us, but by the shift towards authoritarian governance that shocked the position of the constitutional courts and made them a subordinate to the governmental will (in Hungary), or is in the process of so (in Poland).

1.4.2 The European scene

The practice of the European courts can hardly fit in the groupings we propose. First, they do not perform classical judicial review of normative legal acts and, second, they are in a special position from another point of view as well – though the Court of Justice of the European Union (CJEU) has been reached only by cases related to the economic crisis, the European Court of Human Rights (ECtHR) deals only with legal disputes of individual rights under the European Convention of Human Rights (ECHR). However, the persistence or change-ability of their practice can be explored and compared with the development of the national-level constitutional jurisprudence.

As Groppi points out, in as far as the use of foreign law as an instrument in the hands of constitutional courts is concerned, the need to face new challenges has not changed the interpretative practice of national courts, which means that they have not had to resort to the jurisprudence of the European courts or foreign judicial rulings or more intensively than before the crises.[13] Nevertheless, there are significant differences between the national courts as to how courageously they use or refer to the Court's case-law. At the same time, the European courts have fought their own battles in relation to the effects of global challenges, since all of the problems discussed in our book have also European dimensions, and it is a widespread view that these challenges can only be managed successfully on a European level.

Analysing a number of recent judgments of the Strasbourg court, Groppi shows that in most fields the European Court of Human Rights reaffirmed its earlier jurisprudence insisting, for example, on the absolute nature of the prohibition of torture, or on the appellants' right to effective remedy even in such sensitive cases like the treatment of suspected terrorists or asylum seekers. In some cases, it was disposed even to confront the more permissive national judicial practice, when certain basic rights were at stake. Thus, while the Hungarian Constitutional Court did not see anything wrong with the legal mandate of national security authorities to use covert surveillance of the private life of 'sets of people' in order to prevent,

investigate or repress terrorist acts, the ECtHR found it a too broad empowerment without sufficiently specified reasons.

For the ECtHR, it was more difficult to give protection for those who had been affected by the negative effects of the world financial crisis. The ECHR does not recognise the economic and social rights as basic rights providing effective protection for these interests. However, in some areas, the Court applied a wide reading of several civil and political rights protected by the ECHR, using them as tools for recognizing some protection for those who are the losers of economic crisis. Thus, the broad interpretation of the right to property might restrict the central government interventions in the economic sphere, providing an effective tool against illegitimate restrictive financial measures. The scope of judicial protection of individual rights became wider when the financial crisis affected other rights highlighted by the Convention such as the access to courts or the right to a fair trial. However, when such rights were not affected, the Court was reluctant to narrow the margin of appreciation of the national legislatures to take social and economic policy measures. According to Groppi, this deference was constantly justified by referring to the existence of an exceptional crisis without precedents. This kind of caution was noticeable in certain areas in the case-law of the Court of Justice of the European Union as well, for example when the access to social benefits of EU citizens of other Member States or other foreigners was concerned. In reality, only a few relevant cases reached the CJEU, and even in these procedures the Court often referred to the judgments of the ECtHR.

In sum, Groppi concludes that the recent jurisprudence of the European courts demonstrates that under the circumstances of the economic crisis, these courts 'did not alter their case-law, either as regards the admissibility of the recourse (…), or in substantial aspects'. It is another question that this continuity of practice was sufficient to ensure guarantees only in extreme cases and severe violations of individual rights.

Beatrice Delzangles claims that the ECtHR has elaborated a more systematic practice on terrorism cases since 9/11, acknowledging that the 'terrorist violence', as 'an extremely serious situation amounting to a public emergency threatening the life of the nation' is a legally relevant concept. While the Court firmly refused some sorts of justification for rights limitations (e.g. the lack of sufficient resources of state) and insisted on some absolute limits for state intervention (like the absolute prohibition of torture), it was willing to accept the relevance of the 'exceptional' and 'unexpected [economic] crisis' as recognisable circumstances of restrictive government actions. The general references to the principle of proportionality or to the requirement of legitimate aims for any state actions were only conventional parts of reasoning without any meaningful impact. Delzangles stresses, for instance, that the 'low intensity proportionality test in matters related to austerity measures (…) was not sufficient anymore', and that the ECtHR basically pursued a self-restraining stance. In her approach, the relevant case-law of the Court can plausibly be understood in the framework of a 'cooperative negotiation approach' in which the ECtHR is continuously trying to work together with the national courts to find the proper functions of all judicial bodies as stakeholders.[14]

In view of the Court of Justice of the European Union, Varju argues that the Court's practice can be characterised by deference to legislative intent respecting the policy decisions. According to the CJEU position with regard to the underlying political process of decision-making in the affected policy domains, there is only a limited room for judicial intervention that is even more restricted when detailed legal regulation exists – as is quite usual in the affected policy areas (like monetary or fiscal policy). The Court, using a close reading of the relevant legal provisions, has never given up its strategic aim at enforcing the Member States' obligations and promoting the general objectives of the European Union.[15]

2. Major judicial strategies in responding to legal challenges

2.1 General trends in Europe

If we look at the interpretative tools and argumentative techniques that the constitutional courts used for justifying the changes in their case-law, we can find a lot of instruments and ways, though their application certainly varied from court to court and from case to case. The categorization of the national courts according to the change/stability dimension could be a useful theoretical tool for a sketchy comparison of the various jurisdictions and for a description of the possible judicial strategies in responding to the modern challenges. Apart from this, we can identify certain general behavioural patterns that the constitutional courts used to follow when they faced the constitutional problems of global challenges.

First, we have to notice that all global challenges discussed here are complex social phenomena with a lot of different effects most of which have never been brought to a court. Second, we have to notice that the various challenges have not equally been addressed by the constitutional court in different countries. However, the more serious social problems came from a challenge, the greater the chance to have its legal aspects reaching the courts.

One of the most frequently discussed challenges was the financial crisis, which raised several constitutional issues, such as the scope of budgetary and taxation powers of certain public bodies or the legitimate limitations of social and property rights. Indirectly, other basic rights could also be affected, like equality (e.g. when economic or financial burdens were distributed in an unequal way) or the freedom of enterprise and business activity (e.g. when the government monopolised certain economic branches or activities).

As a result, the economic and financial matters have been judicialised to a degree never seen before. But, before we conclude that through the legal responses to the financial crisis the constitutional courts have largely increased their power *vis-à-vis* the political branches and institutions in this field, we must also add that the courts mostly occupied a deferential position in these questions, leaving wide discretionary power for central governments to choose the policy measures for handling economic crisis. The qualitative analysis of the courts' decisions in European crisis management tools also shows that judicial institutions

were generally supportive of new mechanisms and measures of financial stabilization and economic recovery.[16]

Some examples demonstrate (e.g. in Greece) that over the years, as the negative effects of the economic crisis were gradually overcome, the courts became less and less lenient towards restrictive government measures. This shows that there might be a link between the strictness of the courts and the severity of the consequences of crises. The longer the economic austerity policy lasts, the courts show less and less deference to the rights limitations. In other words, in case of long-term constraints, it is difficult to convince the constitutional courts of the necessity of restrictive governmental interventions. In a number of countries, although the constitutional courts were willing to accept the constitutionality of extraordinary measures (for example, cuts in the payments to public employees), they were less disposed to approve policy measures that had long-term effects or that unequally divided the burdens of crisis management. Consequently, the courts most frequently show deference to governmental measures of economic and financial crisis management, but this permissiveness had limits. In this way, the constitutional courts usually followed a half-way strategy trying to find a long-term balance between the reasonable extraordinary powers of the government and the protection of individual rights. This balance evidently depends on the political and constitutional contexts of the individual countries.

Basically, we can draw similar conclusions if we examine the constitutional adjudications in relation to domestic security and antiterrorism laws. Most constitutional courts have proved to be appreciative actors towards these legal acts, even in countries that were not directly affected by terrorist attacks. Although neither the legislators nor the courts have not yet transgressed certain borders (e.g. torture or mass expulsions have not been proposed), it is worrying that the government interventions and restrictive policy actions have no firm limits or borders and that counter-terrorism measures seem to fit into an open-ended process, and that the courts constantly fall back, giving up certain guarantees (see the examples of Hungary or the UK).

The judicial practice is the least elaborated on the issue of mass migration. The influx of migrants in 2015 and the later flows of migrant people took place too fast to allow constitutional courts to give the right legal answers to the relevant constitutional questions, or to establish sound jurisprudence in this issue. While the ordinary courts have had to cope with a lot of individual cases, trying to distinguish refugees from economic immigrants, the relevant constitutional problems were only rarely addressed to the constitutional courts (raising the problem of social rights of migrant people, for example). Furthermore, since the handling of this challenge requires a common European (or, more exactly, an EU-level) solution, the national courts have been mostly reluctant to deal with these issues. Still, the EU-level treatment of mass migration has produced sovereignty problems in some countries, where (as in Hungary) the constitutional courts addressed this topic as an issue of the (national) constitutional identity.

In other special challenges we have found fluctuating judicial practices. While the relevant courts have resolutely tried to defend certain pillars of the traditional bastions

of national legal system in the UK (protecting parliamentary supremacy from the influence of European law) and in Spain (confirming the unity and territorial integrity of the country), they have contributed to considerable changes of the form of government in Italy (in strengthening the executive *vis-à-vis the* other power branches and the regions) and in Hungary (in dismantling the system of the rule of law).

2.2 The tools of creativity

The continuation of the previous or traditional case-law self-evidently did not require any particular justification and it was sufficient to invoke the well-established precedents or constructions. On the basis of a well-elaborated jurisprudence, it can be easier to justify why no special authorisation is required, or why there is no need to give up or abandon the well-admitted constitutional standards.

However, changing the old case-law apparently required more thorough justifications. The results of qualitative research of the various national judicial practices show that the courts deployed several different reasons and argumentative tools for this purpose.

In the first instance, we found that the constitutional adjudication has nowhere been placed on completely new theoretical bases; that is, the constitutional courts have not replaced the traditional methods of constitutional interpretation with a new judicial philosophy or interpretative theory. As a matter of fact, none of the courts has offered any coherent theory of the 'emergency constitutionalism' either, precisely determining the frontiers of the special empowerment of the other power branches or defining the constitutionally permissible tools and instrument in such situations. Under these circumstances, the simplest reasoning for the alteration to the previous case-law was, in theory, the pure reference to the state of necessity or exigency, which needs new and unusual responses, as it was so meaningfully and explicitly expressed by an earlier president of the Hungarian Constitutional Court.[17]

One technique in the courts' toolbox was the reinvention of 'sleeping' provisions of the constitution. This means that an old rule is used in a new way; this happens, for example, when the court declares the unconstitutionality of a statute based on a provision that it has never been used in this way in the past. Another means is to use a special (and unaccustomed) method of constitutional interpretation in individual cases (or in a special group of cases)– such as a 'holistic' or 'economic' interpretation' (of which we can see examples in Greece or Spain, respectively). It is a closely related methodology to create or deduct new constitutional concepts and doctrines that can provide new justifications for rights limitations or other purposes. Sometimes, these newly discovered constitutional ideas and requirements emerged as magic words serving for the justification of the changing practice. Above all, the 'public' or 'general' interest, usually specifying it as the maintenance of the functioning of state or protection of public order, and the 'balanced budget' (provided that it was not explicitly recognised by the constitution) played such a role in constitutional reasoning.

Some constitutional courts were ready for reshaping existing constitutional doctrines and constructions in order to use them for resolving the new conflicts.

The great advantage of this method was that it could conceal the minor changes in the court's perception or case-law. In particular, the necessity–proportionality or 'balancing' test was an appropriate tool for such purpose; first, because it was a generally accepted interpretative method in almost all countries, and, second, it always gave a certain flexibility to the constitutional courts to draw almost any conclusion they want to declare. Another way of changing judicial practice was to invent new tasks and functions for governmental institutions. This can be seen in the coordination of public finances in Italy, which has backed up the government's centralisation efforts, or in the government's obligation to ensure the functioning of state in a number of other countries discussed in this book. For this purpose, the crisis situations provide good reference points for the courts to argue that unprecedented difficulties necessitate the authorisation of the political branches to exercise special powers to overcome them. In doing so, perhaps the consideration by constitutional judges could play a role in that it is better to give a short-term, exceptional and strongly controlled authorization for the governments than to introduce a state of emergency or siege (as the 'terrorism state of emergency' was put into the constitutional text in Hungary, where even the 'considerable and direct danger of a terrorist act' may base the promulgation of the special legal order).

In certain cases, paradoxically, the reference to a more abstract danger of basic rights was used as an argument for approving rights limitations. Pursuant to this kind of reasoning, the intensified state intervention is justified by the public interest for the maintenance of the functionality of the state, where, for instance, the state's solvency or the balance of state budget is indispensable to guarantee the basic rights and liberties of the citizens. It must be added to this that constitutional courts often refrained from thorough investigation as to whether such references were well founded, since it was considered that the definition and ranking of the public interests at this general level is the task of policy makers. It is a recurrent argument for judicial deference that courts are not structurally well-prepared to solve complicated problems, as they do not possess the proper expertise to overrule complex budgetary or anti-terrorist legislation. Furthermore, the self-restraining courts frequently postulate that judges may not replace the government's policy measures with their own choices because it is not their function. Another set of arguments readily reflect the underlying logic of emergency powers accepting the presumption that extraordinary circumstances need extraordinary tools to be overcome.

Whereas the reference to the necessity as a fact triggered by a crisis situation became a part of the ratio decidendi in a lot of constitutional court rulings without further investigation, the constitutional jurisprudence was changeable [or mutable] in assessing the proportionality of the legal means employed in such cases.

3. Reasons and explanations of jurisprudential change and stability – Justifications for jurisprudential changes

Jurisprudential changes and their reasons can be followed up and identified from the published decisions, and, possibly, from the available concurring and dissenting opinions of the constitutional and other high courts. It is more difficult, however,

to reveal the reasons for these changes, and the motifs that have encouraged a court to make changes in its case-law or to overrule an earlier precedent or doctrine.

In the first place, it is important to state that jurisprudential changes can have external or – from the point of view of constitutional courts – 'objective' reasons. In recent years, special crisis-driven constitutional amendments have been adopted in some European countries.[18] First and foremost, these were so-called 'debt-brake' rules; that is, constitutional guarantees against the government indebtedness, or for the obligatory reduction of the existing state debts. Another constitutional innovation was to entrench or interpolate fairly general requirements into the basic laws, primarily the principle of 'balanced' or 'transparent budget'. Such new-generation rules emerged, for example, in the French, Italian, Hungarian, and Spanish Constitution. Certainly, the modifications of the constitutional text may seemingly lead to changes in the jurisprudence of the constitutional courts too. However, it does not mean that the courts are not obliged to justify their decisions made on the basis of the new provisions, even if the simple reference to the textual changes can be an attractive and comfortable solution and was not unprecedented in the practice of the examined courts.

An additional external factor was a new phenomenon of the European 'constitutional mutation' extending the scope of EU institutions to economic governance that induced a 'mirror effect' at national level introducing new constitutional doctrines in the member states judiciaries, like the acceptance of the diminution of the national budget autonomy.[19]

The involvement of the European institutions, including the supranational courts, may affect the national-level constitutional jurisprudence in other areas as well. The constitutional courts can be reluctant to overtake or overrule the emergent EU-level policy in mass migration; or, otherwise, they can get into an awkward situation, as with the Hungarian Constitutional Court, when their judgements were be condemned or neglected by their international counterparts.

However, as we have seen, one can often find significant changes in the constitutional adjudications without any alterations in the constitutional text. We can say that in most cases, the constitutional courts did not need textual changes or changing intention of the constitution-making power for accomplishing significant changes in their jurisprudence. However, the experience shows that even the courts that changed their case-law to the greatest extent, have not deliberately converted to a new philosophy of constitutional interpretation. Rather, they applied odd and several different techniques that were case-dependent or problem-oriented solutions, while the dominant or usual methods of constitutional interpretation as such were not changed or replaced.

As we have seen, there are no general national replies to the constitutional challenges or behavioural patterns that would be followed in all arising matters. The countries (and their legal systems) under examination in this book are very diverse, and the most significant global challenges affect them in such different ways. In light of this, it seems unlikely that a comprehensive theory can be developed that can give a general explanation of the different constitutional courts' strategies and judicial behavioural patterns in relation to the pressures put on

them, and which could reliably predict how the jurisprudence of the various constitutional courts will change in the future. Such a general theory could be based on the correlation between certain common features of the constitutional systems under review or their challenges (as independent variables), and the nature of the constitutional replies given to such challenges by the constitutional courts (as dependent variables). Such independent variables may be the traditions and embeddedness of democratic values in the various countries (making a difference between the 'old' democracies and the 'new' ones in post-communist states), the place of the particular countries according to political geography (in centre-periphery dimension), legal culture (distinguishing common law and civil law systems), or the institutional settings of constitutional adjudication (whether there are specialised/centralised constitutional courts, or not). Moreover, the clusters of challenges (like the threat of terrorism, migration flow or economic crisis) might trigger different legal responses in the dimension of the stability/change dichotomy. Obviously, the level or degree of jurisprudential changes or continuity as outcome are the dependent variables.

However, according to our assessment, such kinds of connections cannot be detected in any of these aspects. As a matter of fact, significant reforms or alterations can be demonstrated in both the 'old' and 'new' democracies (ie France and Hungary), while the relative stability of the constitutional jurisprudence can also be exemplified in traditional and post-communist political systems (as the examples of Germany and Croatia show). Hence, the intensity and direction of changes have taken place regardless of whether the respective countries belong to the centre or the periphery in European political landscape.

Consequently, our major finding is that there is no any specific independent variable determining the stability or variability of constitutional jurisprudence in a particular country, but the special context of the national legal systems can explain how the judicial branch reacts to the major challenges. Even within the same country, it is very unlikely that there would be a dominant cause for the development of case-law in this respect. Of course, there are several factors that in many countries have a significant influence on how the courts respond to constitutional challenges. Thus, the institutional interests of the supreme judicial bodies, such as to build or preserve the legitimacy of the judiciary or to maintain the room for manoeuvre, could be significant considerations in the interplay between the constitutional courts and other public bodies. The courts must justify continuously that they apply consistently the constitutional principles and rules to constitutional litigation and to other cases, and that they do not use their power arbitrarily. The individual attitudes of constitutional judges may also play an influential role in choosing judicial strategies. Judges may be reluctant to assume responsibility by approving unpopular measures and, vice versa, they may be tempted to prevent such measures being implemented.

As to the country-specific reasons, perhaps it is too early to draw general conclusions, and only a few authors of this book have undertaken to give an explanation for the very recent development of the constitutional case-law. Vlachogiannis, for example, argues that the Supreme Court in its crisis-induced practice followed the

changes of public opinion. Though at the beginning, the Court feared the possible consequences of striking down the laws adopted in the course of economic crisis management, as the popular opinion started to become distrustful of the efficiency and fairness of the restrictive policies, the Court's position also began to harden.[20] In spite of this attitude, the German *Bundesverfassungsgericht* has scrupulously maintained that crisis management does not require extraordinary means that overturn the constitutional balance between state bodies or lead to significant legal restrictions of basic rights. As Mehde argues, this position derived from the self-identity of the Constitutional Court as being itself an institutional guarantor of stability.[21]

The change of the jurisprudence of the French Constitutional Council has been probably promoted by the heightened social atmosphere begotten by the brutal and bloody terrorist attacks in Paris and Nice. In this country, where some actions were committed by second- or third-generation immigrants who had been born and grew up in France, the fight against terrorism is also an integration problem. If it is at all possible, this sort of 'neighbour terrorism' is even more frightening than those attacks that are committed by aliens or 'professional terrorists', and in a certain sense, these types of attacks can have deeper consequences, as extremely violent forms of behaviour draw the attention to the failures of social integration or multiculturalism. Moreover, 'Islam fundamentalism' as a phenomenon produces a major challenge to the balance between the religious freedom and the public interest of domestic security, and to the traditional secularism.

Some scholars have tried to import the theory of 'new constitutionalism' and the idea of 'weak judicial review'[22] from the Anglo-Saxon political philosophy and to apply them to the Hungarian circumstances.[23] This approach presumes that all developments including the deep transformation of the institutional settings as well as the functioning of the Constitutional Court have been nothing else than a shift from the 'legal' to the 'political constitutionalism'. Although the detailed analysis of these arguments goes far beyond the scope of our book, it can be noted that this approach seems to be a misconception in Hungary's political and constitutional context, as the theory of political constitutionalism presumes and supports the ultimate power of the representative bodies against the judiciary within the framework of constitutional democracies; accordingly, this tenet is hardly suitable to justify the dismantling of the democratic procedures and institutions.

In Hungary, an empirical research shows that political orientation is the most decisive factor in explaining judicial behaviour; the individual judges follow their personal choices on the politically controversial issues and there is an extremely strong correlation between the voting behaviour of the judges and the political standpoints of the parties that had nominated them.[24] But this is only a consequence of a long process t of authoritarian tendencies that has taken place there since 2010. Therefore, the significant and in-depth change in the jurisprudence of the Constitutional Court has not been the consequence of the legal and political responses to the challenges, but it has rather been an outcome of the decline of the rule of law.

The risk of over-politicisation of constitutional courts was posed also by Balaguer Callejón, Canotilho and Granat for Spain, Portugal and Poland, respectively.

Remarkably, constitutional judges are often divided along professional or ideological cleavages. However, if these courts are polarised by political camps or extra-legal attitudes, their whole legitimacy may be imperiled, because it is questionable what use is a constitutional court which operates on a political basis besides the democratically elected institutions.

In addition, the strength and intensity of the various challenges may also influence what legal answers are given by constitutional courts in the particular countries. When the question is addressed whether survival or collapse of the state, whether casualties or protection of human lives, the courts may show greater deference as in Greece for economic austerity programmes or in the UK or France when the whole society was shaken by brutal terrorist attacks.

Certainly, we cannot exclude that the old judicial practice was not appropriate to be applied successfully to new challenges, and its comprehensive review was really necessary and justified. For example, as we referred to it in the Introduction, some European countries have had to face unprecedented forms of terrorism, and others have been hit by serious economic depression endangering the normal functioning of the state. It can hardly be denied that constitutional culture and national legal traditions also influence whether a constitutional or other high court consistently upheld its relevant case-law, or opened the way for new constitutional standards and conventions. Maybe the most typical example for this definite role of legal culture is the longstanding fight of the British courts with the supranational European law, and their enduring strife to preserve the old and traditional ways of law application.

As the Hungarian and the Polish cases show, the state and conditions of constitutional democracy can be a new potential variable to explain what responses are given by the constitutional justice to the new crises. Earlier we rejected the idea that the strength and embeddedness of constitutional democracy is a major criterion of change or stability of constitutional jurisprudence, as this presumption cannot be justified by the qualitative analyses of our research. The examples of some old democracies, like Britain or France, where the judicial practice has exhibited a lot of change, and, conversely, the relative immutability of the Croatian constitutional case-law demonstrate that there is no direct link between the variability of constitutional practice and the strength of the institutional system. This is not surprising, as neither change nor continuity itself is a negative thing. However, it does not mean that the state of development of the rule of law or the constitutional democracy do not have any influence on the reaction of the judiciary to crisis situations. It is obviously not by accident that the authoritarian tendencies in two post-Communist countries have materialised, and the constitutional courts have not been able to resist the political pressure of political branches. Still, judicial deference is discernible also in strong democracies too, as the crisis-related case-law of the French Constitutional Council or the UK courts show.

4. Epilogue: What next?

Because how the constitutional courts cope with challenges is not a closed process, our findings offer only an early insight into the very recent developments and

trends. And ,although these are basically path-dependent processes, unforeseeable, radical turns may also occur, as demonstrated by the decline of Hungarian or Polish constitutional adjudication. In spite of such theoretical possibilities, we think that there is much to be learned from the crisis-oriented jurisprudence of the constitutional courts.

As we highlighted above, neither the change nor the stability of constitutional jurisprudence is valuable in itself, but to judge whether the evolution of case-law or the performance of a constitutional court is appropriate or not, depends on a number of factors. However, the unfounded changes of case-law, the escape from the responsibility for serious decisions, the hasty rulings and unelaborated new doctrines or interpretive solutions, and, in general, the unreasonable deference may act as a warning of the weaknesses of constitutional adjudication. These phenomena give cause for concern for the future, as other global challenges – from environmental crisis to special problems caused by the technological development – can produce repeatedly new tasks for constitutional courts to be solved. Conversely, if a judicial body, often bearing the responsibility for the ultimate decision on matters that may essentially influence the life of the whole society, is able to guard over the constitutionality and to enforce the constitutional principles and requirements, this is an important guarantee of successful management of global challenges. To do so, there may be a need to revise and reshape existing constitutional doctrines and overrule long-standing precedents, to invent new rights and concepts adapting the living law to the new circumstances, or, vice versa, only the preservation of the well-established judicial constructions and interpretative tools may contribute to the successful crisis management.

In studying the judicial responses to the global challenges and the very recent development of the constitutional adjudication in some European countries, perhaps the most important lesson is that courts are not static institutions and their functioning and achievement depend more on the social environment and the political context than has been believed so far.

The constitutional courts' performance will surely influence their image and in the longer term may contribute to the increase or decrease of their legitimacy. Some authors of this book have already indicated that this issue has arisen in their country, not only for some of their fiercely debated decisions, but also questioning their traditional role and functions. If we look at the very recent trends of constitutional adjudication in Hungary and Poland, the frequent claim about the 'triumph' of constitutional review,[25] at least for the Central European countries, now seems to be a hasty conclusion.

Of course, the controversy about the most effective way of protecting constitutional values and individual rights is a legitimate debate in which all the 'dialogue between national and European courts',[26] the strengthening of the role of supranational institutions,[27] the 'political constitutionalism' or the 'weak judicial review'[28] can be viable and rational options. But it is worth pointing out that even if in some cases the constitutional courts were weak to resist the external pressures put on them, or that they gave wrong or ineffective responses to the challenges, this is not enough reason to impair or abandon judicial review as a basic

instrument of controlling public power. This is especially the case when the alternative of judicial review is to build up an uncontrolled governmental power arguing that extraordinary challenges and tasks require extraordinary means and powers. In fact, the strengthening of constitutional review is a much more plausible solution to its occasional weaknesses.

Notes

1 Hourquebie in this book.
2 STC 62/2011 of 5 May 2011.
3 Balaguer Callejón in this book.
4 See Vlachogiannis in this book.
5 Ibid.
6 Ibid.
7 See Ciolli in this book.
8 Canotilho in this book.
9 See the chapter of Gardasevic in this book.
10 Ibid.
11 Mehde in this book.
12 McEldowney in this book.
13 Groppi in this book.
14 See Delzangles' chapter in this book.
15 See Varju's chapter in this book.
16 Fabbrini (2016) 100–101.
17 See Szente and Gárdos-Orosz in this book.
18 For a detailed analysis on this see Contiades and Alkmene (2013).
19 Tuori and Tuori (2014) 204.
20 Vlachogiannis in this book.
21 See Mehde in his chapter in this book.
22 Tomkins (2012), Bellamy (2007).
23 Pócza (2012) 48–70 and Antal (2013).
24 Szente (2016).
25 See e.g. Paris, Marie-Luce, Setting the scene: elements of constitutional theory and methodology of the research, in Bell, John and Paris, Marie-Luce (eds.), *Rights-Based Constitutional Review. Constitutional Courts in a Changing Landscape*, Edward Elgar (2016). 2.
26 Groppi and Ponthoreau (2013) and Halmai (2014).
27 Jakab and Kochenov (2017).
28 Gyorfi (2016).

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