

I. ARTICLES

PERIPHERAL STRUGGLES WITH MODERN CONSTITUTIONALISM. CENTRAL-EASTERN AND SOUTH- EASTERN EUROPEAN HEADS OF STATE BETWEEN INCORPORATION AND DISSOCIATION OF POWER

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Abstract

The aim of the paper is to investigate factors which have historically influenced constitutional positions of heads of state in exemplary countries of Central-Eastern and South-Eastern Europe. The theoretical framework which informs this research is based on the assumption—rooted in Michel Foucault's and Claude Lefort's work—that modern democracies necessarily deactivate and obfuscate the central locus of power. Nonetheless, as evidenced by Carl Schmitt's theory, the spectre of sovereignty linked to the concept of the state of exception makes the position of the head of state haunted by an extra-legal excess. The modern head of state is therefore a position affected by a fundamental tension between its symbolic meaning and effectively executed power. With this theoretical framework I juxtapose some historical examples of CEE/SEE countries as to the particular historical models of heads of state they have adopted. In the 20th and 21st centuries the constitutional frameworks of the region were determined by its semi-peripherality and the subsequent tension between adoption of external juridico-political patterns and self-determination.

Keywords: *head of state, Central-Eastern Europe, South-Eastern Europe, constitutional theory, sovereignty*

Resumé

Cet article a l'objectif d'étudier les facteurs qui, dans une perspective historique, ont influencé les positions constitutionnelles des chefs d'État dans des pays exemplaires de l'Europe centrale et orientale et de l'Europe du Sud-Est. Le cadre

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théorique qui sous-tend cette recherche est basé sur l'hypothèse – ancrée dans les travaux de Michel Foucault et Claude Lefort – que les démocraties modernes désactivent et brouillent nécessairement le lieu central du pouvoir. Néanmoins, comme en témoigne la théorie de Carl Schmitt, le spectre de la souveraineté lié au concept d'état d'exception détermine la position du chef de l'État en sorte qu'elle soit hantée par un excès extra-légal. Le chef de l'État moderne est donc une institution affectée par une tension fondamentale entre sa signification symbolique et son pouvoir effectivement exécuté. Dans ce cadre théorique, je juxtapose quelques exemples historiques de pays l'Europe centrale et orientale et de l'Europe du Sud-Est eu regard aux modèles historiques particuliers de chefs d'État qu'ils ont adoptés. Aux XXe et XXIe siècles, les cadres constitutionnels de la région étaient déterminés par sa semi-périphéralité et la tension qui se produisait entre l'adoption de modèles juridico-politiques de l'extérieur et la politique de l'autodétermination.

Mots-clés: *chef d'État, Europe centrale et orientale, Europe du Sud-Est, théorie constitutionnelle, souveraineté*

1. Introduction

For comparative constitutional law heads of state are a subject of rather marginal importance. Especially in contemporary constitutional theory, focused on the symbolic underpinning of constitutionalism, distribution and self-constraint of power, heads of state are pawns on the table that itself is an object of interest rather than a topic in its own right.¹ The constitutional position of a head of state is in this sense subservient to the entire edifice of the constitution, its juridical logic and relationship with

¹ A brief account of major works on contemporary comparative constitutional law demonstrates that heads of state are not an autotelic object of study, belonging rather to empirico-historical trivia. See David Landau, Hanna Ferner (eds.), *Comparative Constitutional Making* (Cheltenham, Northampton, MA: Edward Elgar, 2019); Gary Jacobsohn, Miguel Schor (eds.), *Comparative Constitutional Theory* (Cheltenham, Northampton, MA: Edward Elgar, 2018); Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Cheltenham, Northampton, MA: Edward Elgar, 2014); Tom Ginsburg, Rosalind Dixon (eds.), *Comparative Constitutional Law* (Cheltenham, Northampton, MA: Edward Elgar, 2011); Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012); Michel Rosenfeld, András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012).

state power. Analyses like Carl Schmitt's comprehensive account of presidency in the Weimar Republic² seem now obsolete. For the all-too-theoretical gaze of constitutional theory focused on constitution-making³ and its interpretation, this subject might seem excessively empirical—mired in personal and situational circumstances of exercising a public function—that can and perhaps should be relegated to the domain of political science.

Not unexpectedly, political scientists are more eager to delve into particularities of wielding power at the level of heads of state: both in terms of regimes that their position might determine (monarchies, presidential, semi-presidential or parliamentary republics)⁴ and in connection with actual participation of heads of state in day-to-day balance with other powers (prime ministers, ministers, parliaments, courts). As far as Central-Eastern Europe is concerned, the book *Presidents Above Parties?* edited by Vít Hloušek⁵ is an example of a very solid research of this kind, juxtaposing constitutional frameworks for CEE heads of state with actual accounts of how they were used (or abused) by individuals performing presidential functions after 1989.

Nonetheless, political science—even practiced within the field of constitutional law⁶—does not address one of obsessively recurring topics of constitutional theory and philosophy of the law: the emergence of the law from and within violence-backed state power as part of *arcana imperii*. In this respect the position of a head of state remains a permanent paradox embodying the ideological inconsistencies of the modern state. The very fact that the position of a head of state gives the regime its basic determination, but at the same time—in the perspective of comparative

² Carl Schmitt, *Dictatorship. From the origin of the modern concept of sovereignty to proletarian class struggle*, tr. by M. Hoelzl & G. Ward (Cambridge & Malden MA: Polity Press, 2014), pp. 180-226.

³ See Hanna Fenichel Pitkin, *The Idea of a Constitution*, (1987) 37 *Journal of Legal Education*, pp. 167-169.

⁴ See Héctor Fix-Fierro, Pedro Salazar-Ugarte, *Presidentialism*, in Rosenfeld, Sajó, *op. cit.*, *supra*, note 1, p. 630.

⁵ Vít Hloušek (ed.), *Presidents Above Parties? Presidents in Central and Eastern Europe, Their Formal Competencies and Informal Power* (Brno: Masaryk University, 2013).

⁶ See José Antonio Cheibub, Fernando Limongi, *Legislative-executive relations*, in Ginsburg and Dixon, *op. cit.*, *supra*, note 1, pp. 211-233.

constitutional law — its position seems to be secondary to the constitutional framework, embodies the fundamental oscillation inscribed in the nature of the head of state. Under closer scrutiny the heads of state cease to be a fringe subject of interest in constitutional theory; the irremovable excess inherent in this function is a good entry point for reconstructing paradoxes of modern constitutionalism. The modern head of state emerges as an answer to the abyss left by premodern absolute—even more in symbolic than practical terms—power of the monarch.

On the one hand, heads of state in the modern era may be Hegel's 'idiots on the throne':⁷ individuals whose limitations, both in terms of political capabilities and their actual exercise, are not only factual, but also desirable. Their role, sealed by the obscene weakness,⁸ is limited to being a symbolic keystone of the constitutional system. The further they seem to be removed from day-to-day political struggle, the better factor of systemic legitimisation they provide. This line of evolution, first conceptualised in the British monarchy, still provides an influential model both for constitutional monarchies and parliamentary republics.

On the other hand, the heads of state still preserve at least a *potentiality* of active exercise of broad power, both bound by republican constraints and openly authoritarian. Practical competences on the plane of international

⁷ For Hegel, constitutional monarchy embodies the very spirit of modernity: 'The perfecting of the state into a constitutional monarchy is the work of the modern world, in which the substantive idea has attained the infinite form. This is the descent of the spirit of the world into itself, the free perfection by virtue of which the idea sets loose from itself its own elements, and nothing but its own elements, and makes them totalities; at the same time it holds them within the unity of the conception, in which is found their real rationality. The story of this true erection of the ethical life is the subject matter of universal world-history.' [Georg W. F. Hegel, *The Philosophy of Right*, tr. by S.W. Dyde (Kitchener: Batoche Books, 2001), p. 219]. It introduces subjectivity at the heart of the state, but at the same time binds its arbitrariness to produce objectivity pegged on an empty subjective point. 'Personality, further, or subjectivity generally, as infinite and self-referring, has truth only as a person or independent subject. This independent existence must be one, and the truth which it has is of the most direct or immediate kind. The personality of the state is actualized only as a person, the monarch.—Personality expresses the conception as such, while person contains also the actuality of the conception. Hence the conception becomes the idea or truth, only when it receives this additional character.' [*Ibid.*, p. 226].

⁸ See Slavoj Žižek, *For They Know What They Do. Enjoyment as a Political Factor* (London and New York: Verso, 2008), pp. 267-270.

law⁹ and the symbolic position of the chief and embodiment of the state still give individuals in this office a foothold to grasp real power. In this respect the symbolic position of the head of state transcends the constitutional framework it is embedded in. Even though the logic of democratic constitutionalism makes the head of state just one of the state functions within constituent power (even if of acknowledged uniqueness), heads of state profit from an irreducible remnant of the symbolic cloak they possess regardless of their constitutional underpinning. This extraconstitutional halo becomes particularly significant in moments of crises when the head of state takes, in a Schmittean manner,¹⁰ the constitutional regime upon her shoulders and carries it through the murky realm of facts beyond the law—until the keystone that welds the factual and the legal is reconstituted.

Finally, the enigmatic position of the usually collective heads of state in socialist systems of the 20th and 21st centuries sheds light on the distribution of power in these regimes.¹¹ Despite their structural difference with liberal constitutionalism, they also experienced a dynamic of dissociation between real power, usually wielded by First (or General) Secretaries of workers' or communist parties, and the symbolic position of the purely ceremonial heads of state. Sometimes these positions were melted, as in the case of Nicolae Ceaușescu after 1974 or, commonly, the contemporary People's Republic of China, but most often they remained separate. This dynamics reflected not only differences between particular socialist regimes, but also their own internal evolution.

It seems therefore that the head of state in modern governmentality is one of blind spots of contemporary constitutionalism: not because it is not discussed, but because the focus on comparative analysis of constitutional

⁹ International law preserves to the greatest extent the sovereign-related competences and privileges of heads of state: immunities, competences to declare war and peace, appoint and receive diplomatic representatives, as well as *ius representationis omnimodae* which is particularly relevant in all activities related to concluding treaties (Art. 7 (2) of the Vienna Convention on the Law of Treaties from 1969). See also Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford: Oxford University Press, 2014), pp. 10-42.

¹⁰ Cf. Carl Schmitt, *Der Hüter der Verfassung*, (1929) 55 (16) *Archiv des öffentlichen Rechts*, pp. 161-237.

¹¹ See *The State in Socialist Society*, ed. by Neil Harding (London and Basingstoke: MacMillan, 1985).

positions of presidents and monarchs does not reach the true paradoxicality of this function. As in Freud's famous metaphor of *Traumnabel*, 'the dream's navel',¹² the position of the head of state is part of the ramified mycelium that links constituent and constitutive power, extraconstitutional legitimacy and intraconstitutional powers and, last but not least, the state of exception.

This article is an attempt to address fundamental tensions and aporias inscribed in the position of the modern head of state. I will draw on historical examples of non-Soviet European countries of the former Eastern Bloc, which are particularly enlightening. Due to the prolonged juridico-political instability of the region it has experienced frequent changes of regimes in which positions of heads of state were a litmus test of the evolution of constitutionalism. Simultaneously, critical moments epitomised the symbolic extraconstitutional excess inscribed in the very construction of the modern head of state and revealed a double bind between constitutional bulwarks and the actual role of those holding the office.

What makes this region a particularly rich informative object of study is its semi-peripheral position in relation to the West. Contrary to Russia which, as aptly described by Boris Kagarlitsky,¹³ managed to become 'an empire of peripheries' that could at least pretend to develop its own constitutional forms in competition with the Western countries, CEE and SEE countries were permanently exposed to unchallengeable domination of some big Other(s). The region was shaped by shifting maps of hegemony (between historical empires: Germany, Russia, the Ottoman state, and later by the USSR and the US) accompanied by dynamic historical re-orientations of particular countries. Juridico-political patterns were often imported, to mixed effect: warping of constitutional forms in confrontation with pragmatics of power revealed paradoxes of constitutionalism. As a consequence, structural oscillations inscribed in the position of the head of state are here particularly discernible.

¹² Sigmund Freud, *The Interpretation of Dreams*, tr. by J. Strachey (New York: Avon Books, 1965), p. 564.

¹³ Boris Kagarlitsky, *Empire of the Periphery: Russia and the World System* (London: Pluto Press, 2008).

The article will be structured in the following manner. First, I will investigate historical determinants of the position of heads of state in CEE/SEE in the 20th and 21st century. Then, drawing upon works of Foucault, Lefort and Schmitt, I will proceed to outlining a more general theory of how the head of state is inscribed in paradoxes of modern constitutionalism. Finally, I will propose a theoretical framework that allows of grasping the dynamics of roles and functions of the heads of state in CEE/SEE.

2. Historical Determinants of Heads of State in CEE/SEE in the 20th Century

Beginning this analysis not with 'universal' determinants of the position of the heads of state, but with 'particular' regional factors that affect them may seem to be putting the cart before the horse. A 'natural' order would demand to start with outlining the general specificity of the heads of state in modern countries and only later pass to their local variations. Nonetheless, to accept this order would be tantamount to yield to a hegemonic structure of knowledge in which the complexity of a local field is in advance portrayed as 'warping' or 'distortion' of universalised patterns. In this line one can easily fall into a trap comparable to that of Eric A. Posner and Adrian Vermeule who argued that 'Probably the most robust result of cross-country empirical work on dictatorship is that the best safeguard for democracy is wealth'¹⁴: the third factor mediating between 'wealth' and 'democratic constitutionalism' is precisely the relation between the hegemonic centre, its semi- and full peripheries. When it is not properly taken into account, all non-central forms of constitutionalism become deviations and mutations of the only correct model. Therefore, it may be more legitimate to begin with outlining historical determinants specific to the region usually referred to as the 'other' Europe: a zone of impurity, blur and monstrosity that appears so only in through the lens of Western universalism.¹⁵

¹⁴ Eric A. Posner and Adrian Vermeule, *Tyrannophobia*, in Ginsburg, *op. cit.*, *supra* note 1, p. 317.

¹⁵ The literature on (semi-)peripherality in the context of CEE/SEE is abundant. As to the most important publications see: Maria Todorova, *Imagining the Balkans* (New York: Oxford University Press, 1997); Fernand Braudel, *Civilization and Capitalism, 15th–18th century: The*

The most striking determinant of this Europe's development in the 20th-21th centuries is the juxtaposition of two fundamental oppositions. The first is tension between post-colonial/post-dependence re-appropriation of externally generated patterns and the spiral of self-determination. Re-appropriation and self-determination form a continuum of dialectical entanglements that determines political and constitutional forms adopted by particular countries of the region. They unleash dynamics of modernisation and anti-modern backlash, fuelling nationalist and fascist upheavals. The second opposition is determined by political struggle between liberal capitalism, with all variegations of its juridical forms of concealed or ostensible exercise of power, and anti-capitalist revolt openly restoring the dimension of the political.

These two oppositions occasionally tended towards overlapping, for example when re-appropriation of Western patterns after 1989 was a general restoration of liberal capitalism, whereas low-profile anti-capitalist revolt was usually undertaken in the name of self-determination of nationalist flavour. But they could be separated, as in the early post-WWII years of importing Soviet forms of governance (and legal standards that accompanied them)—with their ostensible revival of the political against liberalism—with little space for national self-determination. Nonetheless, the interplay between the two oppositions grasps the dynamics of CEE-SEE regimes: for example, a pro-self-determination revolt against Soviet dominance until 1989 could have been undertaken either with a reference to the pole of liberal capitalism (as in 1956 Hungary or 1968 Czechoslovakia) or to the pole of anti-liberalism (Romania in the periods 1956-1965 and 1971-1989).

Structure of Everyday Life (Berkeley: University of California Press, 1992); Immanuel Wallerstein, *The Modern World System I. Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (Berkeley: University of California Press, 1974); Daniel Chirot (ed.), *The Origins of Backwardness in Eastern Europe : Economics and Politics From the Middle Ages Until the Early Twentieth Century* (Berkeley: University of California Press, 1989); Ivan Berend, *What is Central and Eastern Europe?*, (2005) 8(4) *European Journal of Social Theory*, pp. 401-416; Erika Nagy, Judit Timár, *The (Re-)Production of Peripherality in Central and Eastern Europe*, (2017) 24(2) *European Spatial Research and Policy*, pp. 5-16; Damjan Kukovec, *Law and the Periphery*, (2015) 21(3) *European Law Journal*, pp. 406-428; Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge: Cambridge University Press, 2016), pp. 200-220; José M. Magone, Brigid Laffan, Christian Schweiger (eds.), *Core-periphery Relations in the European Union Power and Conflict in a Dualist Political Economy* (Abingdon: Routledge, 2018).

The dialectics of these two oppositions forms three epochal cycles in the history of CEE and SEE. Taken with a grain of salt, which is necessary in all-too-global perspectives on historical circularity (including even the most substantiated ones, such as Kondratiev's economic theory¹⁶), each of the cycles can be outlined as the sequence of the following stages: (1) re-appropriation via a constitutional act of an imported politico-juridical model, filtered only to a certain degree through national characteristics; (2) unleashing of a dynamics of national self-determination in the process of 'corruption' of the original constituting act. The sequence of these two stages is determined by the region's structural semi-peripherality that originated in transformations of the economy-world in the 16th century,¹⁷ but culminated in the era of liberal capitalism (18th century¹⁸) as a complex of civilisational and cultural relations of dependence. As a result of this position, local antagonisms in the region are not only blurred by relationships between the centre and semi-peripheries, with more or less concealed domination inscribed in them, but they also express themselves in the language determined by a map of borrowings from and resistances against languages of the centre. Domestic political oppositions mix with the opposition centre/semi-peripheries: the 'initial' constitutional act was undertaken by domestic elites of power acting in concordance with international expectations of the current hegemon, whereas the self-determination path remains an obvious rhetorical temptation for forces willing to use anti-elitist language.

The first cycle encompasses the interwar period, with its initial establishment of CEE/SEE governmentality with a clear (although often not direct) reference to Western liberal legality, which then gradually gave way to authoritarianisms of different hues, but having in common mounting nationalism. This cycle was inaugurated by the broadest execution of political self-determination in the history of the region: Poland, Czechoslovakia, the Baltic states, Hungary and Yugoslavia gained full independence for the first time in modern history. The already existing countries of SEE, Romania and Bulgaria, underwent a tectonic shift caused

¹⁶ See Francisco Louçã, *Nikolai Kondratiev and the Early Consensus and Dissensions about History and Statistics*, (1999) 31(1) *History of Political Economy*, pp. 169-205.

¹⁷ Wallerstein, *op. cit.*, *supra*, note 15, p. 15.

¹⁸ Michel Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-79*, tr. by G. Burchell (Basingstoke, New York: Palgrave MacMillan, 2008), pp. 27-73.

by disappearance of the former triangle of hegemonies: German, Austro-Hungarian and Ottoman.

The first cycle began with a violent irruption of the anti-liberal political that ended with reactionary consolidation. Hungary as the only country of the region experienced a proper communist revolution that put in question the ways of executing self-determination. Romania—with its intervention in the Hungarian Soviet Republic—and Poland, winning the so-called ‘Polish-Bolshevik war’, sealed the future model of regional governmentality as a reactionary liberalism with an authoritarian undertone. Not unexpectedly, the only country of the region that did not experience a proper communist upheaval, Czechoslovakia, was also the only one to build liberal constitutionalism in most stable form.

As a result, after the First World War juridico-political models of those CEE/SEE countries that benefitted from the war were built with a clear reference to the patterns associated with the winning hegemon, the Third French Republic. Hungary and Bulgaria, the two defeated states of the region, adopted much more authoritarian paths—with, respectively, Miklós Horthy’s regency and tsar Boris III’s dictatorship. Heads of state were obviously crucial institutional devices at the moment when new regimes were established; yet with time their role only mounted as the region swerved towards authoritarianism and various forms of rule-through-exception in the 30s. Heads of state, often drawing legitimacy not—or not only—from the constitutional order, but from historical monarchical continuity (Romania, Bulgaria), military fame (Hungary) or pre-independence political activity (Czechoslovakia), often proved more stable than the regimes that underpinned their position. Significantly, in countries that remained independent throughout most of the Second World War (Hungary, Romania, Bulgaria) the heads of state were not only the locus of ordinary power, but they also determined their countries’ main international alignments.

The second cycle—the period of ‘socialist democracies’—is more peculiar because the patterns of governmentality were both imposed and anti-capitalist in nature, shattering the usual Fascist-like conflation of self-determination with anti-liberalism. The original constituting acts, modelled after Soviet practices, were still rooted in revolutionary rhetoric of building

a new social order in an international spirit; then they transmogrified into ossified authoritarian (or, occasionally, quasi-totalitarian) regimes that more and more resorted to nationalist rhetoric of self-determination against 'the Moscow centre'.¹⁹ Interestingly, the latter could swerve either in the liberal direction (as in the case of the 1956 Hungarian uprising, the Prague Spring or, but with additional restrictions, Polish Solidarity of 1980) or towards fascist-like affirmation of anti-liberalism (as in the case of Romania after 1971).²⁰ This period was characterised by the specifically socialist 'double state' in which state apparatuses were mirrored by the organisation of the communist party; constitutionalism was, to a large degree, purely symbolic or, as Mark Tushnet put it, 'sham'.²¹ Its particularity introduced into the position of the heads of state a fundamental dissociation between effective power, usually concentrated in the hands of general or first secretaries, and often purely symbolic (to the point of negligibility) formal heads of state. For this reason, first secretaries were often treated—and listed²²—as heads of state *de facto*.

Finally, the third cycle was opened in 1989-1990 with a sweeping wave of liberal democracy passing through post-socialist countries. More than ever the adopted constitutional frameworks were close to their Western models. Juridico-political forms were imported directly; just as France in the 20s, so did Germany provide a source of inspirations, especially in the field of fundamental rights. The adoptions of the rule of law standards was, as Jíří

¹⁹ Ken Jowitt, *New World Disorder. The Leninist Extinction* (Berkeley: University of California Press, 1993), pp. 159-219.

²⁰ Vladimir Tismăneanu described this dynamics in reference to Romania: 'from its very inception, Romanian national communism contained an ambiguous potential: in accordance with the inclinations and interests of the leading team and the international circumstances, it could have led either to Yugoslavization—that is, de-Sovietization coupled with de-Stalinization—or to Albanization—that is, de-Sovietization strengthened by radical domestic Stalinism. The dual nature of RWP's divorce from the Kremlin stemmed from the contrast between its patriotic claims and its refusal to overhaul the Soviet-imposed Leninist model of socialism. The ambivalence of the RWP's "independent line" was deeply rooted in the anxiety of the Romanian communist elite that reforms would unleash political unrest and jeopardize the party's monopoly on power.' Vladimir Tismăneanu, *Stalinism for All Seasons. A Political History of Romanian Communism* (Berkeley: University of California Press, 2003), p. 184.

²¹ Tushnet, *op. cit.*, *supra*, note 1, p. 11.

²² See John V. da Graça, *Heads of State and Government* (London: MacMillan, 1985).