The Backlash to European Constitutionalism: why we should not embrace the identitarian counter wave

Marlene Wind

In RED 2021/2 N° 3 , pages 48 to 51
Publisher Groupe d'études géopolitiques

DOI 10.3917/red.003.0052
Uploaded: 10/17/2022

Marlene Wind • Professor at the University of Copenhagen, Department of Political Science and Professor at iCourts, Faculty of Law

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In October 2021, the Polish judge Agnieszka Niklas-Bibik was suspended for a month only two days after the CJEU gave Poland a daily fine of €1 million. The fine was for failing to shut down the Polish Supreme Court's illegal Disciplinary Chamber which prosecutes national judges who engage with European law.[1] Niklas-Bibik was the eighth Polish judge forced to step back because she rejected the political court capture in Poland and insisted on her right to implement judgements from the ECtHR and CJEU. She had moreover taken the liberty to refer a preliminary question to the CJEU.[2] Since the Niklas-Bibik case two more judges have allegedly been suspended by the so-called 'muzzle-law' and they probably will not be the last. What does this story tell us? It tells us not only that the rule of law and independence of the courts is no longer respected in Poland but also that this could be an example of a more general 'de-constitutionalisation' phenomenon where national courts, judges and politicians increasingly retreat from the European post-war constitutional settlement.

According to the V-dem project,[3] an institute that monitors and tracks democracy around the world, we have since 2015 experienced a democratic backsliding that trumps the number of countries that are democratizing. This development is reflected in the European Union itself, where democracy has come under increasing pressure over the past 10 - 12 years.

In the following, I will look into the phenomena of de-constitutionalisation building on Lusting and Weiler's idea of waves. Where they see the revolt against constitutionalism and judicial review as an understandable reaction, I argue for the opposite - in particular when looking at Europe. The backlash to European constitutionalism should be seen as a wakeup call, not as something to celebrate or accommodate. European democratic fragility is often overlooked and complacency - in particular when it comes to defending our European constitutional order - is currently one of our greatest challenges.

The wave theory of constitutionalism

In their article 'Judicial review in the contemporary world - retrospective and prospective',[4] Lustig and Weiler classify the evolution of constitutionalism since the Second World war into three waves. The first wave was the adoption of judicial review, human rights, and strong domestic courts *at the national level* in Europe and beyond. Constitutionalism or what Lustig and Weiler refer to as the 'democratic ontology'[5] had one important purpose in the post-war era: to keep a check on parliaments after the heinous atrocities of the War where unlimited majorities had more or less a free hand. Constitutionalism and judicial review came to represent the very notion of what we today mean by the rule of law (and not by man).[6]

The second wave that Lustig & Weiler mention is closely linked and represents a growing use 'of the international norms as a higher law within national constitutional orders'.[7] This was in the post war era in Europe represented by not only the EU treaties and the supremacy of EU law, but also the European Convention of Human Rights and the ECtHR case law. Suddenly states (governments, national courts and citizens) started referring to these supranational legal regimes as authoritative sources of law trumping the rules and prerogatives of their own sovereign states. All of this is a well-known story but a story with severe defects as constitutionalism was much less widespread in the northern parts of Europe than what is normally contemplated by mainly American scholars of constitutional law.[8] European constitutionalism is however today a phenomenon which faces serious challenges. This can be seen by the Polish right wing PiS government's justice reforms[9] where suspension and punishment of those judges who uphold EU law and engage with the European court have become the order of the day. Lustig and Weiler define what we see in Poland and many other places these years as an example of 'the third wave' of judicial review or constitutionalism but one might more precisely call it 'the third wave of de-constitutionalisa-

1. Order of the Vice-President of the Court in Case C-204/21 R Commission v Poland, 27 October 2021, see at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210192en.pdf
2. See more at: https://ruleoflaw.pl/judge-niklas-bibik-suspended-for-applying-eu-law-and-for-asking-preliminary-questions-to-the-cjeu/
3. See more at: https://www.v-dem.net/en/news/trend-mobilization-autocracy/
4. D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and prospective', (2018) International Journal of Constitutional Law, Vol. 16 No. 2, 315–372.
5. Phrase used by Lustig and Weiler, see D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and prospective', 316.
6. *Ibid*, 316.
7. *Ibid*, 319.
8. R. Hirshl, 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) International Journal of Constitutional Law, vol. 9 No 2, 449-469.
9. W. Sadurski, *The Polish Constitutional Breakdown* (Oxford University Press 2019).

tion'. The third wave is described as a reaction to the first two and could even be described as a revolt against global constitutionalism, which in the past 30 years has been hailed by lawyers and observers in many quarters.[10] In the third wave national courts and governments may not reject all supranational law but what we are facing - also in Europe - are national courts and governments that increasingly question the limiting bonds of international courts and judges for instance by ignoring supranational courts, by not citing them or referring fewer and fewer cases.[11] We all of a sudden also see national courts exercising 'judicial review of transnational and international governance adjudication' something, which Lustig and Weiler agree represents 'a new identitarian seam in constitutional discourse'.[12] What does this imply more specifically? It implies that while the first two waves came to define 'the staple of constitutional law theory for decades' most prominently in Europe, we are today witnessing an anti-constitutionalist surge where domestic courts increasingly seek to take back power from international treaties and norms with reference to their own constitutions and case law. One may even call it 'constitutional identity politics' as it is often about using the constitutional culture as a political weapon against supranationalism.[13]

The most obvious example is the recent questioning of EU law supremacy in Poland by the Constitutional Tribunal as the CJEU declared the Polish justice reforms and the Polish Supreme Court's Disciplinary Chamber to be unlawful.[14] Following Lustig and Weiler, we however also see it in the German Constitutional Court case law[15] in well-known cases from *Solange*, over the Maastricht and Lisbon treaties, to the recent PSPP case. Other examples are less-known Hungarian cases and cases from Czech Republic and Denmark.[16]

The Polish Tribunal's refusal to accept significant parts of EU law primacy in 2021 was however not a 'traditional' *judicial* revolt. It was 'ordered' or requested by the Polish PiS government itself, which makes it far more worrying. The PiS governments' direct attack on the EU legal order thus let the spirit out of the bottle, inspiring others far beyond the Polish borders. All of a sudden, not only right-wingers like French Marine Le Pen, Eric Zemour and Viktor Orban but also a respected conservative like Michel Barnier as well as the contender to the French Presidential election Valerie Precesse[17] started questioning the primacy of EU law. A similar questioning of the European Court's legitimacy was uttered in the Danish Folketing by the Danish minister of justice, Nick Hækkerup in November 2021[18] where he sneered at the CJEU and its logging case law:

'I think we have a fundamental problem when the CJEU creates law without democratic legitimacy. They are just judges. Why should they be allowed to decide what should be the law in Denmark? Why should anyone without democratic legitimacy be allowed to decide that?'[19]

This brings us to the Nordic region where constitutionalism as mentioned never prospered and where majoritarianism is still thriving.[20]

The Revival of the Majoritarian question

Lustig and Weiler rightly describe the first two constitutional waves as parallel phenomena constituting the national acceptance of judicial review and a more abstract idea of a European higher law represented by both European Union law and the ECHR and ECtHR case law. The authors however neglect (except in one footnote[21]) how the Northern part of Europe and the UK largely stayed in the majoritarian camp when it comes to the first wave - introducing strong courts and judicial review at the national level.[22] Northern Europe countries have kept cultivating the idea of 'sovereignty in parliament' and did not introduce constitutional courts with strong review powers - in the UK not even a supreme court until 2009.[23] Looking at the second wave the Nordic states formally accepted European higher law but primarily because they had to in order to become members of the EU. When it comes to the ECHR, this body of law was mainly regarded as something meant to help other countries, so it was only incorporated into national (secondary) law in 1992 - and

10. See A-M. Slaughter, 'The Real New World Order' (Sep. - Oct., 1997), *Foreign Affairs*, Vol. 76, No. 5, 183-197.

11. With a co-author I demonstrate empirically how politically captured courts will stay away from making references to the CJEU. See J.A. Mayoral and M. Wind, 'Unleashed dialogue or captured by politics? The impact of judicial independence on national higher courts' cooperation with the CJEU' (2021) Journal of European Public Policy.

12. D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and prospective', 319.

13. M. Wind, *Tribalization of Europe – a defense of our liberal values* (Oxford: Polity 2020).

14. Order of the Vice-President of the Court in Case C-204/21 R Commission v Poland, 27 October 2021.

15. D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and prospective', 355.

16. https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html; see also J. Komarek's analysis of the Czech case available at https://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/; on the Danish Ajoas case see M.R. Madsen, H.P. Olsen, U. Sadl 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) European Law Journal, Vol. 23, No. 2, 2017, 140-150; see also K.E. Sørensen and U. Neergaard, 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case' (2017) Yearbook of European Law, vol. 36, no 1, 275-313.

17. See, 'EU court president warns European project is in danger', POLITICO (available at : https://www.politico.eu/article/eu-court-president-koen-lenaerts-warn-european-project-danger/).

18. https://www.ft.dk/samling/20211/almdel/EUU/samspm/G/index.htm

19. Free translation from Danish.

20. I here rely on R. Dworkin's distinction between majoritarian and constitutional democracy, see R. Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Harvard University Press 1996).

21. See footnote 10 in D. Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and prospective'.

22. See J. E. Rytter and M. Wind, 'In need of Juristocracy: the silence of Denmark in the development of European legal norms' (2011) International Journal of Constitutional Law, Volume 9, Issue 2, 470-504; and M.Wind, 'Do Scandinavians Care about international law? A Study of Scandinavian Judges Citation Practice to International Law and Courts' (2016) Nordic Journal of International Law 85, 281-302.

23. https://www.supremecourt.uk/about/history.html

as my own research shows is rarely cited in national law.[24]

Constitutionalism and judicial review were never discussed in public or even mentioned by politicians as a natural consequence of joining the Union (or the ECHR) – which is reflected in the Danish justice Minister's rather clumsy attack on the CJEU's legitimacy (cited above).[25] Due to the inherent and continuing distaste for judicial review of national legislation, the Scandinavian courts were also reticent when it came to forwarding preliminary references to the CJEU.[26] The explanation was quite straightforward. As dialoguing with the CJEU via preliminary references[27] constituted a form of judicial review though the back door (and that by a 'foreign' court outside the bonds of the nation state), neither judges nor civil servants in the ministry of justice (or politicians for that matter) encouraged this to happen. The Scandinavians thus forwarded extremely few cases and rarely intervened in cases before the CJEU with oral or written procedure in the first 4-5 decades.[28] At the national level the Danish Supreme Court only once in 172 years (since Denmark got its constitution in 1849) set aside a decision taken by the Parliament;[29] in Finland and Sweden judicial review was directly forbidden in the national constitutions until the beginning of the 2000s. In Denmark, we still more or less explicitly teach the students in law and political science at the universities that there is 'No one over or above' the Danish Folketing.[30] This is very similar to the British conception of 'sovereignty in parliament', which made it very hard to accept supranational law, something Brexit is a very good example of.[31] It is probably also no surprise that the United Kingdom and Denmark tried to take back power from the Strasbourg court during the two countries' Presidencies in 2012 and 2018 respectively in their Copenhagen and Brighton Declarations.[32] Human rights should 'be brought home' as they put it – and not left to supranational courts to decide about.[33]

Both Lustig and Weiler, but also Ran Hirshl,[34] argue that the Nordic reticence to suprantionalism and supranational bodies outside the state is a very good example of how well functioning democracies may thrive without constitutionalism and judicial review.[35] According to Lustig and Weiler, the Scandinavians moreover have strong sense of *demos*, something that supranational entities and international regulation lacks, as also argued by the German Constitutional Court. To this, one could add an enormous emphasis on ethnicity and homogeneity in the population with very little space for diversity. For historical reasons national courts also do not consider it their role to check the actions of the state by challenging it on behalf of individual citizen. One may thus problematize the implicit idealization of majoritarianism which easily neglects the downsides and not least the interests of the minority. What is also rarely mentioned or discussed is how this anti-constitutionalist Nordic position has had severe consequences for the domestication of international law, as courts – as mentioned above – rarely cite international sources and refer very few cases to the European Court thereby providing citizens with a less solid protection than they could have had.[36] The question is of course if the majoritarian and anti-constitutionalist position which has existed for centuries in Scandinavia (and the UK) have inspired illiberals in Central and Eastern Europe who now also want the majority to rule without any restricting limits from courts.

The identitarian prophesy

Despite the Scandinavian/UK outlier cases, the way in which most Europeans in the past six decades embraced higher law and norms was in many ways revolutionary.[37] It was however far from inevitable and may change in the future.

While Lustig and Weiler's perspective is global and not focused specifically on the European Union (having been written before the constitutional crisis in the EU peaked in 2021), they nevertheless seem to sympathize with the combined majoritarian-identitarian turn. They primarily argue that global constitutionalism by many is seen as ha-

24. J. Christoffersen and M. R. Madsen, 'The End of Virtue? Denmark and the Boomerang of the Internationalization of Human Rights'. On citation to the ECHR and ECtHR see Wind 2016 fn.24.

25. M. Wind, 'The Hesitant European? The Constitutional Foundation of Denmark's EU Membership and Its Material Reality', forthcoming in Stefan Griller, Lina Papadapoulou, Roman Puff (eds), *Member States' Constitutions and EU Integration* (Oxford: Hart forthcoming in 2022).

26. M. Wind *et al.*, 'The Uneven Legal Push for Europe' (2009) European Union Politics, 63-88.

27. M. Wind, 'The Nordics, the EU and the Reluctance towards supernational judicial review' (2010) Journal of Common Market Studies; M. Wind *et al.*, 'The Uneven Legal Push for Europe' (2009) European Union Politics, 63-88; S. Larsen, 'Varieties of Constitutionalism in the European Union' (2021) The Modern Law Review, Volume 84, Issue 3, 477-502.

28. S. Larsen, 'Varieties of Constitutionalism in the European Union'.

29. M.Wind, 'Who is afraid of European Constitutionalism', in C. Franz, F. C. Mayer and J. Neyer (eds), *Modelle des Parlamentarismus im 21. Jahrhundert. Neue Ordnungen von Recht und Politik; Recht und Politik in der Europäschen Union, Band 4* (NOMOS 2015).

30. C. Friisberg, *Ingen over eller ved siden af Folketinget I-II* (Syddansk Universitetsforlag 2007). See also H. Palmer Olsen, *Magtfordeling* (Djøf Forlag 2005).

31. M. Wind, 'Why the British Conception of Sovereignty Was the Main Reason for Brexit – And Why the British 'Leave-Vote' May End Up Saving rather than Undermining the EU' (2017) *Centro Studi sul Federalismo* Research Paper. CSF-SSSUP Working Paper Vol. 2017 No. 3

32. https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf; https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf

33. See more in M. Wind, *The Tribalization of Europe – a defense of our liberal values*, (Polity 2020).

34. R. Hirshl, 'The Nordic counternarrative: Democracy, human development, and judicial review'.

35. *Ibid.*

36. J. Christoffersen and M. R. Madsen, 'The End of Virtue? Denmark and the Boomerang of the Internationalization of Human Rights' (2011) Nordic Journal of International Law 80(3); see also M. Wind, 'Do Scandinavians Care about International Law? A Study of Scandinavian Judges Citation Practice to International Law and Courts' (2016) Nordic Journal of International Law 85(4), 281-302. On this point, see also J. E. Rytter and M. Wind, 'In need of Juristocracy: the silence of Denmark in the development of European legal norms'.

37. See J.H.H. Weiler 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1993-1994) 26 Comp. Pol. Stud. 510; 'The Transformation of Europe' (1991) Yale Law Journal, Vol. 100, No. 8, Symposium: International Law (1991), 2403-2483.

ving a 'reductionist perspective on individuality'[38] where the citizen's groundedness in her own cultural society and norms is much more important than previously anticipated and thus not taken seriously enough. The question now is of course whether this is true and if so, how one should address it.

I will not be able to answer these (pertinent) questions in this brief essay; but one important question is whether such a perspective could be soundly transferred to a European context. Should we, in other words, let the identitarian logic penetrate European constitutionalism – something we are already witnessing in parts of the Union? In my humble opinion, any identarian-based rejection of European constitutionalism would be extremely dangerous and have repercussions for all far beyond its worst protagonists. It would in reality amount to a goodbye to the Union as we know it and the cohesion of the internal market, and most likely also to those common liberal values which are encapsulated in the treaties, the *acquis communautaire* and our common post-war history.

Following Lustig and Weiler, the third wave however represent more than just an identitarian turn. It is also a reasonable reaction to a democratically unaccountable intentional order with no appeal options:

> *'To the extent that international law is not legitimated democratically the compliance pull of international institutions, both empirically and normatively, would be weakened… There is no appeal-contrary to a widespread norm of justice which expect judicial decisions to be appealable… if there is merit in this analysis it is easy to see how it feeds, and feeds into, a social and political discourse of 'taking back control' so potent in a variety of manifestations in contemporary politics.'* (p. 345)

In Europe however, European law is democratically legitimated and can be amended by the EU's legislative bodies in unison. A unilateral rejection of the EU legal order, or an insistence on sticking to constitutional identity, on the other hand, embodies a non-compromising identarian logic, which not only puts European law on the ropes but elevates the (in this case Polish) constitution to a position above the commonly accepted European constitutional settlement. While the German Constitutional Court has on multiple occasions criticized the EU for not being democratic enough and for carrying out tasks that had not (yet) been conferred to it, the revolt we see in Poland is different. It is not about wanting to give more powers and democratic legitimacy to the EU level so that it may better (and legally) carry out its tasks. It is about the opposite – a sovereigntist and identarian drive to pull up the drawbridge and reject any joint exercise of European sovereignty.

38. *Ibid*, 369.