

PROCESS, CONSEQUENCES  
AND MEANS OF  
(DE)CONSTITUTIONALIZATION:  
A RECONSTRUCTION OF  
GUASTINI'S CONCEPT OF  
CONSTITUTIONALIZATION

MARIO **KREŠIĆ**



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MARIO KREŠIĆ

Assistant professor, University of Zagreb, Faculty of Law, Chair of Legal Theory.  
E-mail: [makresic@pravo.hr](mailto:makresic@pravo.hr)

ABSTRACT

The second half of the twentieth century witnessed a modification of many legal orders by a process called “constitutionalization”, although it is not always obvious what exactly has changed or how. Any theoretical endeavour to explain this phenomenon will be faced with questions such as how this process differs from other transformations of the legal order, what the conditions required for the process to arise are, whether there can be differences in the degree of this process, whether the process is reversible, what the consequences of this process are in the legal system, what kind of practice is necessary for the process to happen and what the ultimate cause of this practice is. Furthermore, different explanations can be more or less suitable for use in empirical research.

The theory of constitutionalization advanced by Riccardo Guastini is a suitable conceptual tool for describing this phenomenon although some of its presuppositions should be made explicit. Based on his theory, constitutionalization will be understood as referring to a specific legal-political model of the legal order and its description will consist of the following elements: process, consequences and means. In addition to a detailed analysis of the main elements of Guastini's concept of constitutionalization, the concept of the reverse process of deconstitutionalization will be introduced. Since both concepts include the attitudes of judges and other actors as a necessary element, the concept of the legal consciousness as an integral part of both concepts will be proposed. The analysis provided in this article may contribute to theoretical and practical perspectives on constitutionalization and deconstitutionalization.

KEYWORDS

constitutionalization, deconstitutionalization, legal consciousness, constitution, Riccardo Guastini.

# Process, consequences and means of (de)constitutionalization: a reconstruction of Guastini's concept of constitutionalization

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## 1. *Introduction*

The second half of the twentieth century witnessed a modification of many legal orders by a process called “constitutionalization”, although it is not always obvious what exactly has changed or how. Any theoretical endeavour to explain this phenomenon will be faced with questions such as how this process differs from other transformations of the legal order, what the conditions for the process to arise are, whether there can be differences in the degree of this process, whether the process is reversible, what the consequences of this process are in the legal system, what kind of practice is necessary for the process to happen and what the ultimate cause of this practice is. Furthermore, the explanations can be more or less suitable for use in empirical research.

The paper discusses the process of constitutionalization understood as the process of the transformation of a legal order which results in its impregnation with constitutional norms. It analyses Riccardo Guastini's concept of constitutionalization, starting from the hypothesis that this concept is a useful analytical tool for describing and explaining the relevant changes in contemporary legal orders.

Guastini usefully demarcates three meanings of the term constitutionalization, sets out three conditions for constitutionalization, identifies its five aspects, and determines its outcome. However, it seems that, in view of some particular phenomena, as well as with regard to some aspects of all relevant phenomena, this analytical tool is, at least *prima facie*, insufficiently sharp and explanatory. The paper claims that, first, in relation to the process of transformation of the legal order itself, the concept of constitutionalization should be able to account for the difference between the phenomenon of constitutionalization and other transformations of legal orders, the possibility of constitutionalization in legal systems that do not have a written constitution with characteristics usually found in constitutionalized legal orders, the appearance of a difference in the degree of constitutionalization between different legal orders and the possibility of a reversible process. Second, in relation to the results of this process, the concept

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of constitutionalization should be able to account for the consequences for the legal system that go beyond the simple assertion that the legal order is influenced by the constitution. Finally, given the means that lead to such processes, the concept of constitutionalization should be able to account for the different practices of judges and the ultimate causes of these differences.

The paper argues that the insufficient sharpness and explanatory value of Guastini's concept of constitutionalization is due to the fact that some of its elements remained at the level of implicit assumptions. Therefore, the primary aim of the paper is to make these implicit assumptions explicit and show the concept's usefulness in identifying, describing and explaining all the phenomena in contemporary constitutional legal orders that one can capture by the term constitutionalization as defined above. To this effect, the paper will offer a reconstruction of Guastini's understanding of constitutionalization. The reconstruction will mostly consist of expressing the implicit assumptions of Guastini's theory and adding a few distinctions compatible with the theory. In particular, it will include the introduction of: a) the distinction between the processes, means and consequences of (de)constitutionalization; b) the concept of deconstitutionalization; c) two consequences of constitutionalization regarding the characteristics of norms and the mode of changing the legal system; d) the definition of constitutionalizing practice as the judicial practice determined by a set of doctrinal assumptions and interpretative directives that the judges in constitutionalized orders are supposed to follow, and e) the concept of the legal consciousness.

Since Guastini's concept of constitutionalization rests on an analysis of legal academic discourse (more precisely, constitutional law discourse), its reconstruction will be informed by the views of the comparative constitutional law scholars pertaining to classical and new constitutionalism as two models of the legal-political order. In particular, the two models will be used to explain changes in the characteristics of constitutional norms, and for an explanation of the different meanings of deconstitutionalization.

The secondary aim of the paper is to indicate the possibility of developing an analytical tool suitable for empirical research into constitutionalization and deconstitutionalization which is currently lacking.

The paper first presents the elements of constitutionalization according to Guastini's concept of constitutionalization and a framework for the reconstruction of Guastini's theory (§ 2). Thereafter, the process is determined more closely (§ 3), and two controversial issues related to the process are discussed separately (§ 4). Then the two consequences of the process are explained in detail: a change in the specific characteristics of the constitutional norms (§ 5) and a change in the mode of changing the legal system (§ 6). Finally, the means to achieving these consequences are analysed and explicated: constitutionalizing practice (§ 7) and legal consciousness (§ 8).

## 2. *The concept of constitutionalization*

### 2.1. *Riccardo Guastini's concept of constitutionalization*

We will briefly describe Guastini's explanation of constitutionalization as exposed in his book *La sintassi del diritto* which contains all the elements needed for the purpose of this article as his last non-modified views on these elements<sup>1</sup>.

<sup>1</sup> For example, the same elements of Guastini's concept of constitutionalization can also be found in GUASTINI 1998, GUASTINI 2003; GUASTINI 2006, GUASTINI 2011.

Guastini has differentiated three meanings of the term constitutionalization. The first two meanings are the introduction of a written constitution and the establishment of at least some legal relation between the sovereign (originally the monarch) and its subordinated subjects (initially represented in the parliament)<sup>2</sup>. The third meaning of constitutionalization Guastini describes as a «process of transformation of a legal order, at the end of which the legal order is completely “impregnated” by constitutional norms», i.e. they occupy the entire space of social and political life<sup>3</sup>. Such a state of the legal order, according to Guastini, is characterized by specific practices that we can call “constitutionalizing practices”<sup>4</sup>.

A more comprehensive description of legal and one segment of political practices can be found in Guastini’s elaboration of the five aspects of constitutionalization<sup>5</sup>: a) the idea that all constitutional norms are binding; b) an interpretative attitude to fill constitutional gaps by the creation of implicit norms; c) a doctrinal thesis according to which the courts may apply the constitutional norms directly; d) an adaptive interpretation of the statutory provisions (it.: *interpretazione adeguatrice delle leggi*); e) an attitude to extend the impact of constitutional norms to political relations. The last-mentioned aspect is subdivided into three elements: e1) the introduction of an institutional framework that allows for adjudication in some political relations; e2) a doctrinal thesis on the judicial review of political discretion followed by an interpretative attitude to argue the decision reached in the review by applying the principle of reasonableness and the technique of value balancing, and e3) political argumentation in political discourse based on constitutional norms<sup>6</sup>. A long (i.e., including the catalogue of rights), rigid and judicially guaranteed constitution is considered to be a precondition for constitutionalization<sup>7</sup>.

## 2.2. Setting the framework for a reconstruction of Guastini’s concept of constitutionalization

In describing constitutionalization, Guastini starts with three meanings which differ in their emphasis on different elements important for the observed phenomena. When referring to different elements of a legal phenomenon it is firstly important to distinguish whether the elements are part of the existing practice of legal actors or part of the theoretical (ideological or methodological) practices of those referring to the practices of legal actors. This is the first distinction of the term constitutionalism made in the meta-theoretical discourse<sup>8</sup>. In defining constitutionalization we will start with an understanding of this term as referring to the legal-political model practiced in a particular community. Since scholars of comparative

<sup>2</sup> GUASTINI 2014, 189.

<sup>3</sup> GUASTINI 2014, 190. Similarly to Guastini, Pierluigi Chiassoni considers the legal order constitutionalized when 1) the constitution is regarded as the basic source of law, 2) therefore it affects the legal and political system of the country and social life at large, and 3) it comprises the specific features regarding the constitution (which are similar to Guastini’s five aspects; see below, nt. 6). CHIASSONI 2011, 329.

<sup>4</sup> According to Guastini, constitutionalizing practices encompass legislative, judicial, doctrinal and political practice as well as the practice of citizens. GUASTINI 2014, 190 f.

<sup>5</sup> GUASTINI 2014, 193-215. In *La “constitucionalización” del ordenamiento jurídico: el caso italiano*, Guastini described seven conditions of constitutionalization, stating that the list is not final. In addition to the five aspects of constitutionalization described in *La sintassi del diritto*, the list contains a rigid and guaranteed constitution. The elements of a rigid and guaranteed constitution are considered necessary conditions, while the remaining five conditions are considered to be sufficient conditions. GUASTINI 2003, 50-58.

<sup>6</sup> Similarly to these five aspects we can find the five features of constitutionalization by Chiassoni: normativity, overinterpretation, the constitution as a political programme, direct application, interpretative fit. In addition to constitutionalization at the national level, «at the international level, the process of constitutionalization involves the establishment of effective ways in which fundamental rights can be protected globally. This can be achieved either by successfully widening state protection, or by supra-national guarantees». CHIASSONI 2011, 329.

<sup>7</sup> GUASTINI 2014, 191-193.

<sup>8</sup> We are following the distinctions made by Paolo Comanducci. He emphasized two meanings of the terms “constitutionalism” and “neoconstitutionalism”. COMANDUCCI 2002, 89.

constitutional law deal with existing legal-political models it is important to take their descriptions into consideration. After all, Guastini himself starts his exposition with reference to the discourse of legal science. This brings us to the second important insight regarding the different meanings of constitutionalization: the legal-political models themselves can be differentiated with regard to the elements they contain. Namely, in the discourse of comparative constitutional law, the distinction between two types of constitutionalism can be found<sup>9</sup>. We will name this second distinction in constitutionalism the distinction between classical and new constitutionalism. Following comparative constitutional law, the first term could be ascribed to the model of the legal-political orders existing in the period from the 18<sup>th</sup> to the first part of the 20<sup>th</sup> century and the second after the Second World War<sup>10</sup>. In Guastini's concept of constitutionalization this distinction is not explicitly stated, although it is present when distinguishing the three meanings of constitutionalization. He refers to the discourse of legal scientists on the process that appears after the Second World War and later to the doctrine of classical constitutionalism to explain a legal order that is not constitutionalized<sup>11</sup>.

This distinction between new and classical constitutionalism is present throughout this paper, since it refers to the models of the legal order to which the processes lead. In particular it is used for the explanation of: a) changes in the characteristics of constitutional norms, and b) the different meanings of deconstitutionalization. An important addition to Guastini's theory is making explicit an element which is perceived in the discourse of comparative constitutional law as a distinctive element between the two types of constitutionalism which causes debate on new constitutionalism. In the field of comparative constitutional law this element is defined as the absence of the supremacy of the parliament, and in this paper we will take account of this element through the prism of the legal system and explain it as a transformation of the mode of changing the legal system. Although the element of the absence of parliamentary supremacy is not a particularly prominent element in Guastini's concept of constitutionalization, it certainly stems from the fifth aspect of his concept.

From the insights of Guastini's theory, we can identify the following three elements of the concept of constitutionalization: a) process, b) consequences and c) means. As we will soon see, this restructuring of his theory through these three categories is possible without losing any of the main elements of his description of constitutionalization. There are three reasons for the restructuring of Guastini's theory in this three-part model. The first reason is to group his insights in a way which is more suitable for debate on the theoretical and practical problems of constitutionalization. The second reason is to make his theory more connected with theories in comparative constitutional law, especially regarding the consequences of constitutionalization.

<sup>9</sup> The term "new constitutionalism" is used by Tamas Gyorfı to describe the constitutional set-up after the Second World War: dualist constitutional architecture, codified bill of rights, judicial supremacy and the robust exercise of judicial review. What we call "classical constitutionalism" Gyorfı named "orthodox constitutionalism" characterized by: monistic constitutional architecture, the lack of substantial constraints on legislation and the lack of constitutional judicial review. GYORFI 2016. Stephen Gardbaum makes the distinction between "the legislative supremacy model of constitutionalism" as the dominant model throughout the world prior to 1945 and "the American model of constitutionalism" after World War II. GARDBAUM 2001.

<sup>10</sup> We shall make two remarks on this classification. First, the distinction between models is related to the practices typical for a particular period of time with possible exemptions. The crucial exemption in terms of the timeframe of the appearance of the classical and new constitutionalism refers to the constitutionalism of the United States of America. The second remark is that the distinction between the two types of constitutionalism which could be made from methodological and ideological aspects is still contested by legal theory. The name neoconstitutionalism was proposed by scholars of the Genoa School in order to criticize the methodological and ideological aspects of theories labelled by that name. BARBERIS, BONGIOVANNI 2016, 263. Giovanni Battista Ratti separated the negative and positive theory of neo-constitutionalism, whereby the second group refers to discoveries about contemporary legal systems. RATTI 2015.

<sup>11</sup> GUASTINI 2014, 189 and 190.

The third reason is to avoid a circular definition by introducing the elements of means and consequences. The term “impregnation” mentioned by Guastini can be conceived as shorthand for the result of the five operations (aspects) listed above which we named “constitutionalizing practice”. To be more precise, it could be said that “impregnation” means that the constitutionalized legal order is absolutely influenced by the constitution. However, to provide more substantive information on what “absolute influence by the constitution” means for the legal order without referring to the constitutionalising practices which cause this result, we need further explanation of the consequences of constitutionalization.

The process of constitutionalization requires further determination. When comparing it with other processes of transformation, the explanation requires the identification of the characteristic which distinguishes it from other processes of the transformation of legal orders. Additionally, the position regarding its degree and reversibility should be clarified. Under the presumption that this process can be reversible, the concept of deconstitutionalization will be introduced and considered as the opposite mirror concept to constitutionalization throughout this article. The character of the process can be an interesting topic for further elaboration and this paper will address two such questions: the meaning of deconstitutionalization and the character of the process with respect to the existing constitution.

Although Guastini has not explicitly mentioned a newly-established relation between legislation and the judiciary as a consequence of constitutionalization, comparative constitutional law has described this phenomenon by including the element of the absence of the supremacy of the parliament as part of the new constitutionalism model<sup>12</sup>. In line with Guastini’s view on the changing of the legal system, this element can be perceived as a transformation of the mode of norm-changing. This term means that the norms in a constitutionalized legal order are changed not only through statutes but also through adjudication in a specific way. On the other hand, in a constitutionalized legal order a practitioner of law considers that constitutional norms produce specific effects, for example that they are directly applicable. These effects are not anticipated explicitly by legal provisions but appear through practice by the ascription of specific characteristics to constitutional norms. We propose that these two elements be perceived as the consequences of constitutionalization.

Among the elements of the new constitutionalism, some can be considered the means which lead to the above-mentioned consequences. Although the existence of a rigid, long and judicially guaranteed constitution contributes to constitutionalization it can be argued that this is neither a necessary element for constitutionalization if these characteristics are perceived as the elements of the written constitution, nor a sufficient element for the process of constitutionalization. The second means – the constitutionalizing practice of courts – will be regarded as a necessary means for constitutionalization although it is not possible without the third means we propose to attach to the definition of constitutionalization. This is the element of the legal consciousness which is not mentioned in the field of comparative constitutional law nor explicitly observed in the legal theory we are going to use as the foundation for the elaboration of constitutionalization.

Consequently, the stipulative definition of constitutionalization proposed in this article is the following: constitutionalization is the specific process of the transformation of the legal order which leads to a change in the characteristics of the constitutional norms and a new mode of changing of the legal system, through the means of the constitutionalized practice of courts determined by the legal consciousness.

<sup>12</sup> See above, nt. 9.

### 3. *The process of constitutionalization and deconstitutionalization*

The first element of Guastini's concept of constitutionalization is that it refers to the process of transformation of the legal order. We will add three additional insights regarding this element.

Firstly, we shall add that constitutionalization (from the point of view of the model of new constitutionalism) is a specific type of transformation since the legal order can be modified in different ways. We shall group these ways under two main types. The first type represents a systematic change in the essential patterns of behaviour of citizens, the second is characterized primarily by the transformation of the mode of changing or applying the legal norms<sup>13</sup>. Both transformations could occur through the explicit change of normative provisions or through new practices whereby the normative provisions stay the same. In addition, the mode of changing and applying the legal norms can be transformed by changing the power-conferring norms and by changing the directives on doctrinal assumptions and interpretation in the existing set of power-conferring norms.

Constitutionalization can be considered to belong to the second group of the first distinction since the final consequence of this process refers to the transformation of the mode of changing the legal system which, besides the legislative, includes the adjudicative agencies. Additionally, this change cannot happen solely through a change in the power-conferring norms but through a necessary change in the courts' interpretative practice. The adjudicative application of norms remains the same in terms of the norms on the competence of the organs to adjudicate and the adjudicative process these organs use, the logical structure of deductive reasoning, the existence of a process of the identification of norms belonging to the legal system, the implementation of some styles of interpretation (methods) and different techniques of argumentation. As we will see later, the change lies in new practices regarding the use of directives in the interpretation process, which transforms the mode of changing the legal system into the legislative-adjudicative mode. To make this type of transition more illustrative we can provide the following example. In a state X the constitution does not contain the power-conferring provision that the Supreme Court of the country can supervise the political decisions of the parliament. The Supreme Court makes a decision in which, according to the legal-political doctrine which the judges of that court recognize as the source of law, the Supreme Court may supervise the decisions of the parliament. Through the interpretation of the Constitution and statutes, the Supreme Court starts not only to supervise but also to guide the political decisions of the parliament. The power-conferring provisions in the written Constitution remain the same, the Supreme Court is performing the function of applying the law as prescribed by the Constitution but the practice of the Supreme Court changes. At the same time, a state Y has a constitutional provision which authorizes the Supreme Court to supervise political decisions. The judges of that Supreme Court do not accept the doctrinal assumptions and interpretative directives which characterize constitutionalizing practice. In the state Y the power-conferring norms remain the same but constitutionalization does not take place. In both cases the question is not whether structural changes regarding the behaviour of citizens occur, but whether a change in the mode of how norms on behaviour are introduced or abolished in society really takes place.

Secondly, the question is whether such a process could go in the opposite direction<sup>14</sup>. If so, then this reverse process could be called "deconstitutionalization"<sup>15</sup>. Deconstitutionalization

<sup>13</sup> In the first group we can include, for example, transition from the socialist to the capitalist legal order or transition from the theological to the secular state. Examples of another type include the accession of the European states to the European Union, the separation of new states from an existing one, and decentralization or regionalization of the state.

<sup>14</sup> Barberis considers that the development of the constitutional state through three phases – rigid constitution, constitutional supervision and the impregnation of the legal order by constitutional norms through interpretation –

could be defined as the opposite process which by the means of the deconstitutionalized practice of courts determined by the legal consciousness leads to the consequences opposite to those of constitutionalization.

Thirdly, if constitutionalization is defined as a process we can ask the following question. How can we ascertain that the process is complete and when can we say that the order has been entirely impregnated by constitutional norms? The answer to this question could be that, although we might not say that this process ever ends entirely in real life, we can nevertheless use a theoretical model of a completed constitutionalized legal order to compare it with the description of an actual legal order to place it closer to or further from the model<sup>16</sup>.

#### 4. *Two remarks on the process*

##### 4.1. *How to determine deconstitutionalization?*

In the second section we made a distinction between the practice of legal actors and practices (theories, ideologies or methods of analysis) referring to the existing practice of legal actors, as well as a distinction between the types of existing practice of legal actors. It is important to differentiate several practices of legal actors (listed below) which can be compared with the theoretical model of (de)constitutionalization. Whether these practices will be considered to be part of deconstitutionalization depends on the theoretical model used. As mentioned before, these practices of legal actors as a phenomenon could be observed through the classical constitutionalism model or through the model of new constitutionalism.

With regard to the model of classical constitutionalism, we can say that constitutionalization would mean the following real practices of legal actors: a) the introduction of a written constitution, and b) the establishment of some legal relations between the sovereign and citizens. These two practices are the first two meanings of constitutionalization mentioned by Guastini which he separates from the meaning of the phenomenon he wants to describe. In the same vein, deconstitutionalization with regard to classical constitutionalism would mean the abolition of a written constitution or abolition of any legal restraints on political power. Guastini also mentions the characteristics of a rigid, long and guaranteed constitution as the conditions of constitutionalization in the model of new constitutionalism and it can be concluded at first sight that a constitution without such characteristics would mean deconstitutionalization. According to

is not an irreversible process but difficult to reverse. «Più che uno stato, lo stato costituzionale è un processo evolutivo, non irreversibile ma difficilmente reversibile (ingl. path dependent), sviluppatosi sinora in tre fasi» (BARBERIS 2017, 23).

<sup>15</sup> Chiassoni mentions the term “de-constitutionalization process” when describing critics of constitutionalized national and international legal orders from the late 1970s, and in the context of four crises that appeared at that time. He has mentioned four crises of a) legality, b) social solidarity, c) the sovereignty of the constitution and the related crisis of the constitutional state, and d) the crisis of the global rule of law and the related crisis of supranational constitutionalism. CHIASSONI 2011, 330.

<sup>16</sup> It can be noticed that when referring to constitutionalization, Guastini is using the term “process at the end of which” (“processo [...] al termine del quale”) the legal order is completely impregnated by constitutional norms. Similarly, Comanducci: «Se trata de un proceso al término del cual el derecho es “impregnado” [...]» COMANDUCCI 2002, 95. Chiassoni more precisely mentions that: «A legal order is constitutionalized (such a property being of course a matter of degree), whenever [...]» CHIASSONI 2011, 329. Although there is no further explanation of what these expressions (complete impregnation, matter of degree) exactly mean, it seems useful to accept the view that constitutionalization is a matter of degree. This view directs researchers, for example, to investigate whether one legal order is more constitutionalized now than before, or whether one legal order is more constitutionalized than another legal order. Of course, this would require development of an analytical tool for measurement of such a process.

Guastini, in classical constitutionalism the constitution constrains political power, albeit in a limited scope of relations. In addition, we can mention that even if the practice of legal actors introduces judicial supervision of constraints on political power in this limited scope of relations, but constitutionalizing practice does not appear, the legal order could still be considered deconstitutionalized from the point of view of new constitutionalism. We have seen that according to Guastini's third meaning, constitutionalization refers to progress towards the model of new constitutionalism, and means a process which progresses, at least theoretically, to the final point of establishing a new order entirely impregnated by constitutional norms. If we use the term "impregnation" in the same vein, deconstitutionalization would then mean that the legal order is not impregnated by constitutional norms. As we have proposed above, the term "impregnation" as the consequence of (de)constitutionalization can be replaced by two features of the legal system.

In accordance with all these insights, the term "deconstitutionalization" could refer to any of the following practices:

- 1) abolition of the written constitution with limited legal constraints on political power;
- 2) abolition of the specific characteristics of the constitution (rigid, long and guaranteed);
- 3) abolition of the specific practices of courts which are more than pure supervision of the limited legal constraints on political power;
- 4) abolition of the specific characteristics of constitutional norms;
- 5) abolition of the specific mode of changing the legal system.

From the point of view of the classical constitutionalism model of the legal order, the legal order would be deconstitutionalized in the first case. In principle the first and second cases could be considered to lead to deconstitutionalization from the new constitutionalism point of view but additional remarks will be made below. From the point of view of the model of new constitutionalism the order is already deconstitutionalized in the fourth and fifth case, and since these consequences are not possible without the means of the specific practices of the courts, the order is also deconstitutionalized in the third case.

Regarding the third case additional explanation is needed. Legal orders which recognize the practice of the courts to supervise the limited constraints of political power can be differentiated from legal orders which recognize the practice of the courts to legally direct political power in all situations. There are two differences between these two practices. The first difference refers to the scope of actions under the authority of the courts: limited scope of actions of political power versus all activities of private and political power in the legal order. The second difference refers to the characteristic of the courts' approach to exercising this power: supervision of political power versus supervision and material guidance (legal direction) of (political and private) power. From the point of view of new constitutionalism, the legal order would be already deconstitutionalized when the courts do not exercise the authority to provide material guidance (legal direction) of political and private power even though the limited supervision of political power by the courts remains<sup>17</sup>.

Regarding the second case, it is worth emphasizing that a rigid, long and judicially guaranteed constitution presents one of the demarcation characteristics between classical and new constitutionalism as defined by comparative constitutional law. However, it can be claimed that its explicit introduction or abolition in formulated norms by the creator of the first constitution or the authority for amending the constitution is neither a necessary nor a

<sup>17</sup> Even before the Second World War, some legal orders had institutionalized judicial review but still could not be considered constitutionalized in the sense of the processes which appeared after the War.

sufficient element of the beginning or the end of the (de)constitutionalization process. A rigid, long and judicially guaranteed constitution is considered by Guastini to be a prerequisite of constitutionalization. Nevertheless, a constitutional framework which explicitly provides these elements according to Guastini is not sufficient for the beginning of the constitutionalization of the legal order because, despite its existence, constitutionalizing practice may not occur. Of course, a legal order in which the courts are more empowered for constitutional adjudication and interference in political relations is likely, but not necessarily, to be more constitutionalized through practice. In favour of the thesis that these characteristics of a constitution (rigid, long and guaranteed) do not have to be necessarily formulated in a written constitution, the following case can be mentioned. The historical example of the *Marbury v. Madison* case shows that constitutional adjudication does not necessarily have to be established by an expressed power-conferring norm, but might be the product of the courts' practice<sup>18</sup>. This is in line with Guastini's view, who never says that constitutionalization must be imposed by expressed norms<sup>19</sup>. The aforementioned case is considered by Guastini to be an example of the juristic construction of an unexpressed legal norm which was not formulated by any authority of normative power<sup>20</sup>. From the doctrinal assumptions on the constitution, the judge in this case has derived two implicit norms which were not explicitly formulated in a constitutional text: any legislative act contrary to the constitution is invalid and the Supreme Court is authorized to declare its invalidity<sup>21</sup>. The juristic construction of unexpressed norms, as a special kind of interpretation, can sometimes be governed mainly or exclusively by legal-political doctrine (theoretical or doctrinal assumptions)<sup>22</sup>. The border between the application and the creation of the law by courts is not always clear<sup>23</sup>. In the same vein, although more difficult, the constitutionalizing practice of courts may overcome other "constitutional gaps" regarding the rigid and long constitution. Abolition of the rigid, long and judicially guaranteed constitution contained in expressed constitutional norms would definitely mean the end of the constitutionalized legal order only if the constitutionalizing practice of the courts somehow does not continue. The other way to reach a deconstitutionalized legal order is to end the constitutionalizing practices of the courts even if the constitutional framework remains the same. The question arises: how can constitutionalization happen if the constitution is not rigid

<sup>18</sup> Chiassoni considers that the institutional prerequisite for the process of constitutionalization of a legal order (rigid constitution and judicial review) is not a necessary condition, as the same effect can be obtained through constitutional interpretation. CHIASSONI 2011, 329.

<sup>19</sup> Guastini's type of realism, which is named Genoa's realism, can be described as perceiving the law as between two elements: the text and interpretation. The hypothetical situation described above, although problematic with regard to the first element, can be incorporated in this view if the situation is perceived as the establishment of a new constitution or application of an existing one through juristic construction. On Genoa's realism see: BARBERIS 2011. However, besides stressing the characteristics of Genoa's realism, Barberis has also emphasized the situation of a crisis of the sources as a kind of a test for theories of law when cases such as *Marbury vs. Madison* appear. Barberis noticed the tension between the mainstream theory of law and (truly) realistic theory in explaining such situations whereby the explanation of constitutional adjudication as the final instance for fixing the supreme sources and their hierarchy is the explanation that truly realistic theory would propose.

BARBERIS 2016b, 13.

<sup>20</sup> GUASTINI 2014, 183 nt. 25, 390.

<sup>21</sup> GUASTINI 2012, 214.

<sup>22</sup> GUASTINI 2014, 414-417. According to Guastini the texts of legal scientists and, correspondingly, judgements, contain theoretical assumptions ("asunciones teóricas") which precede the interpretation of any specific provision and these theoretical assumptions have no direct relation to the normative texts. They condition interpretation by directing the interpretation in a certain direction and excluding possible different interpretative options and they constitute a basis for the derivation of a great number of implicit norms. GUASTINI 2012, 213.

<sup>23</sup> In any case the effectiveness of the norms produced by this kind of activity of the courts which are not authorized by the expressed power-conferring norms is crucial for the legal status of these norms. See the text on the relation between the process of constitutionalization and the existing constitution below and the notes 28 and 29.

and can be changed freely by ever-changing legislative majorities? Although this statement on the possibility that the courts continue their constitutionalizing practice contrary to the will of the legislator seems counterintuitive it is worth mentioning this situation at least for theoretical reasons<sup>24</sup>. Moreover, the practical situation in which the supreme court and the parliament of a legal order are in political conflict is not something that cannot happen in reality<sup>25</sup>. Finally, the specific practice of the courts in Commonwealth countries manifests the possibility that the practice of constitutionalization, at least in some aspects, can occur in the framework of a flexible constitution<sup>26</sup>.

#### 4.2. *The process of constitutionalization and the change of the constitution*

The transformation of the mode of changing the legal system through the courts' interpretative practice, which occurs despite existing constitutional provisions on norm creation only through statutes, raises the question of whether this process changes the constitution (changes in the broader sense which includes the establishment of a new constitution and a change in the existing one). The answer to this question can be sought by referring to the theories on the difference between changing the existing constitution and establishing a new one<sup>27</sup>, and comparative constitutional law's concept of "amendment through interpretation" as one of the possibilities for changing the constitution<sup>28</sup>. Depending on the point of view, the process can be described as the establishment of a new constitution or a change in the existing one<sup>29</sup>. Regardless of which point of view is taken, the effectiveness of the norm on the legislative-adjudicative mode of changing the

<sup>24</sup> In the aforementioned Marbury case (1803), the sentence of Chief Justice John Marshall is based on the broader political doctrine on the constitution. In contemporary constitutional situations, the argument on establishing a material hierarchy which is based on a prescribed mode of changing the constitution which is different to the mode of changing the statutes, strictly speaking is not a logical argument after all. At the same time, constitutional courts sometimes establish a material hierarchy between the supreme court and the other constitutional norms based on an axiological hierarchy which is not based on explicit constitutional norms.

<sup>25</sup> For example, the Polish constitutional crisis of 2015 or the Rhodesian crisis of 1965 are indicative cases. It is also worth mentioning the constitutional situation in the United Kingdom which does not have a rigid constitution but the possibility of constitutionalization in this country through judicial practice could still be argued. Even those who oppose the possibility that judges themselves could change the rule of recognition towards judicial review in countries with parliamentary supremacy like the UK, accept the possibility that courts can initiate such a change: «Of course, any change to a rule of recognition must start somewhere: someone has to initiate the requisite change in consensus. The courts can attempt to initiate change, but they can succeed only if other branches of government are willing to accept it». GOLDSWORTHY 2010, 114. And this initiative by the courts could be successful without having a written rigid and long constitution before that.

<sup>26</sup> The aspect of the interpretation of the statutes in line with fundamental rights exists for example in the United Kingdom. GARDBAUM 2001, 743.

<sup>27</sup> On the substantive and formalistic approach see: GUASTINI 2014, 167-171. On the political and legal point of view: GUASTINI 2017, 391 f. From a political point of view the identity refers to the organization of political powers and a change of the identity is a matter of political evaluation. The answer to the question whether introducing or abolishing the constitutional review of statutes presents a change of constitutional identity presupposes political evaluation.

<sup>28</sup> TUSHNET 2018, 325. Guastini also recognizes the change of the constitution through interpretation. Since from the legal point of view the constitution can be viewed as a system of norms, Guastini concludes that the constitution can also be changed by the interpretation of the constitutional text. In doing so, he makes the same point as for a change in the constitutional text: although literal application of this point of view means that any change in the system of norms is at the same time a change in the constitution, it would not be appropriate to consider every change in the constitution by interpretation as the establishment of a new constitution. GUASTINI 2017, 391-393, nt. 50 and 51.

<sup>29</sup> The process could be described as: a) the establishment of a new constitution due to a practice of changing the constitution not determined by the existing constitution; b) the establishment of a new constitution due to a change in the supreme principles of the legal order; c) a change in the constitution by creating a new constitutional norm; d) a "change in the constitution through interpretation" by applying an existing unexpressed constitutional norm (which can be formulated by the method of juristic construction).

legal system is crucial for the legal status of this norm. The norm either becomes part of the legal order based on the principle of effectiveness or confirms its existence in the legal system as an unexpressed norm by the courts' effective application of that norm. In this sense, the case of transformation of the legal order by constitutionalization confirms the thesis of those scholars of comparative constitutional law who claim that «[...] the ultimate test of whether a constitutional amendment or replacement is legally valid is empirical: [...] has the constitution taken root in the polity to create a reasonably stable constitutional system?»<sup>30</sup>.

##### *5. The first consequence of (de)constitutionalization: a change in the characteristics of the constitutional norms*

The first consequence of constitutionalization can be explained by considering the starting point of this process. Guastini finds this starting point in the doctrines of the “classical constitutionalism” of the eighteenth and nineteenth centuries. According to these doctrines the norms of constitutional law have a very limited scope of regulation including only norms which refer to the organization of the legal authorities and possibly norms which refer to the civil rights and freedoms that constrain these authorities<sup>31</sup>. We call this scope of regulation the minimum scope of the legislator's constraints, as all other activities of the legislator which do not refer to the organization of the legal authorities and possibly the fundamental rights and freedoms are not constrained. The legislator has the exclusive task of giving concrete expression to the constitution, while the courts do not directly apply it but the directives derived from the statutes<sup>32</sup>. Although it is not always clear whether all the norms of this minimum scope of constraints belong to legal or to moral norms, the maximum reach of the adjudicative application of the constitution could be the application of those constitutional norms which refer to the organization of the legal authorities and the civil rights and freedoms (minimum scope of the legislator's legal constraints). Finally, constitutional norms represent only a constraint on legislators (limited to the minimal scope as defined above) and not positive material guidance of the decisions of the legislator imposed by legal norms (legal directing of the legislative function)<sup>33</sup>.

From such doctrines it follows that in the deconstitutionalized model of the legal order, the constitutional norms are attached to the following lack of capacities: a) the lack of capacity to produce legal effects in all areas of social life; only constitutional norms on the organization of authorities and rights and freedoms potentially can be seen to produce legal effects; b) the lack of capacity to be directly applicable without interference from the statutory provisions; courts can apply statutes produced by the legislator and possibly only those constitutional norms defining the organization of the legal authorities and rights and freedoms, and c) the lack of capacity to legally direct overall political discretion.

<sup>30</sup> TUSHNET 2018, 329. In addition to this thesis, the “ultimate test of legal validity” of a norm on the legislative-adjudicative mode of changing the legal system can be understood as the test of: a) ex post acquisition of legal status by the effectiveness of the constitution (explanation of the process based on the thesis of establishment of a new constitution); or b) the effectiveness of the norm through adjudicative practice as the criterion for determining the membership of a norm that is not produced in accordance with the existing provisions on changing the legal system (explanation of the process based on the thesis on changing the constitution through the creation of a new norm), or c) effective application of an existing but unexpressed norm by judges (explanation of the process based on the thesis on changing the constitution through interpretation).

<sup>31</sup> GUASTINI 2014, 190.

<sup>32</sup> GUASTINI 2014, 194.

<sup>33</sup> GUASTINI 2014, 201.

Based on this description of the characteristics of constitutional norms in a deconstitutionalized legal order, we can conclude that in a constitutionalized legal order, constitutional norms are assigned the opposite three capacities: a) an unlimited capacity to produce legal effects (in all situations); b) the capacity of direct applicability; c) the capacity to govern political discretion. If we understand the processes of constitutionalization and deconstitutionalization as logically opposite models, then we can conclude that the latter is directed at the starting point of the former and *vice versa*.

The differences between these three characteristics are significant in the theoretical and practical considerations of constitutionalism. For example, constitutional norms could be considered legal norms which produce legal effects but are not applicable by courts; or considered not to be legal norms precisely because they are not applicable by courts<sup>34</sup>. Apart from that, even if constitutional norms could be considered to be legal norms applicable by courts, this still does not mean that courts would really use them to produce legal effects with the aim of directing political discretion.

This distinction between the models of constitutionalized and deconstitutionalized legal orders with respect to the three characteristics of constitutional norms can be compared with the theoretical distinction between the legislative and constitutional state that is used in the theory of law to describe the development of legal positivism. The difference is made with regard to the main source of law: in the legislative state the main source of law is the legislation, and a constitution is the main source in the constitutional state<sup>35</sup>.

However, what does it mean when we say that the constitution is the main source of law? Besides the meaning that the constitution cannot be derogated by another source we can use Guastini's analysis to elaborate on this question in more detail. We can start first with the meaning of the constitution as a source of law. According to Guastini, this expression means different things: 1) constitutional norms produce legal effects, i.e. they are legal norms; 2) they can produce an invalidation effect on statutory norms; 3) they can be directly applicable; 4) they can have a direct effect on the regulation of horizontal citizen-citizen relations and not only in vertical state-citizen relations<sup>36</sup>. It seems that all these meanings refer to the legal nature, direct applicability and different effects produced by legal norms and thus correspond to the first two characteristics ascribed to constitutional norms in a constitutionalized legal order. This insight will be elaborated as follows.

The first theoretical assumption that the constitution is the source of law (the first meaning) can be equated with the first characteristic of constitutional norms in the constitutionalized legal order: constitutional norms have unlimited capacity to produce legal effects. This assumption includes the following two theoretical assumptions regarding the constitution as the source:

- all constitutional norms (principles and rules, programmatic norms<sup>37</sup>; expressed and unexpressed norms) produce legal effects, i.e. all constitutional norms are legal norms; unexpressed constitutional norms produce legal effects;

<sup>34</sup> Waldron stressed the distinction between two approaches to determining the legal character of constitutional norms: according to the first one, constitutional norms are legal norms if they produce legal effects from the internal point of view; and according to the second one constitutional norms are legal norms if they are enforced by courts. WALDRON 2006.

<sup>35</sup> Barberis distinguishes the legislative state (*Gesetzstaat*) from the constitutional state (*Verfassungsstaat*) based on the main legal source: in the latter, the main legal source is not legislation but the constitution. BARBERIS 2016a, 181.

<sup>36</sup> GUASTINI 2014, 161-163. The third meaning is mentioned when elaborating the second meaning.

<sup>37</sup> According to some views it can be said that programmatic norms are also principles. We have made this distinction only because programmatic norms are mentioned in Guastini's description of constitutionalization. The difference itself does not have any influence on the discussion in this section.

- constitutional norms produce legal effects for all subjects and relations, i.e. legal norms produce legal effects in vertical relations (subjects: legal organs and citizens) and horizontal relations (subjects: citizens).

The second theoretical assumption that the constitution is the source of law (the third meaning) corresponds to the second feature of the constitutional norms: constitutional norms are directly applicable. The following three assumptions on the source (second and fourth meaning) can be grouped under this assumption:

- constitutional norms are directly applicable (without the interposition of statutory provisions) as legally relevant for decisions;
- constitutional norms which guarantee subjective rights (not only rights and freedoms but also social rights) are directly applicable (without the interposition of statutory provisions) for the specific legal effect of establishing rights and duties for all subjects and relations, i.e. for vertical and horizontal relations;
- all constitutional norms are directly applicable (without the interposition of statutory provisions) to bring forth the specific legal effect of invalidating norms.

However, in addition to the definition of the constitution as the source of law, it is essential to explain the meaning of the “main source of law”. On the one hand, the main source of law can be understood as the source which is the supreme and primary source, and on the other hand it can be understood as the main source of norm creation (changing the legal system).

Guastini analyses the assumption that the statute (ordinary statute) is the primary and supreme source<sup>38</sup>. The statute is the supreme source of law if all other sources (customs, decrees, precedents) are subordinated to the statute and represent its application; it is a primary source if the legislative function does not represent the application of any other existing norms. In the same vein, the constitution is the supreme and primary source if all other sources, including the statutes, are subordinated to the constitutional norms and represent their application and if the first constitution is understood as the *extra ordinem* act<sup>39</sup>. The end of the legislative act as the primary and supreme source is caused by a change in the characteristics of constitutional norms<sup>40</sup>.

The theoretical assumption that the constitution is the supreme and primary source of law can be equated with the third feature of constitutional norms in a constitutionalized legal order: they direct political discretion, and this assumption includes the following theoretical assumptions regarding the supreme and primary source:

- statutory norms represent the application of the constitutional norms;
- statutory norms represent the correct application of the constitutional norms only if they are in material and formal compliance with the constitutional norms;
- statutory norms represent the correct application of the constitutional norms only if they are in compliance with reasonableness established by the constitutional norms<sup>41</sup>;

<sup>38</sup> GUASTINI 2014, 132-134.

<sup>39</sup> GUASTINI 2014, 239. Guastini emphasises the distinction between formal and material subordination.

<sup>40</sup> Guastini mentions several reasons that led to the fall of the statute which can be grouped as: constitutional constraints on the legislators' legal practice, regionalization, European integration and the dominance of executive power in law creation. GUASTINI 2014, 141-143.

<sup>41</sup> When describing the fifth aspect Guastini mentions two methods for influencing the political power of the parliament: a) using the principle of reasonableness, and b) balancing. This and the following assumption refer to this part of his theory. GUASTINI 2014, 211-215.

– statutory norms represent the correct application of the constitutional norms only if they (the statutory norms) are in compliance with the hierarchy of constitutional values<sup>42</sup>.

A few remarks can be made on this last group of theoretical assumptions. They are formulated as relating to the statutory norms, but they refer equally to the individual norms. The first theoretical assumption is general and it can refer to both subordination of the statutory norms to constitutional norms and directing political discretion to implement the constitutional norms. The second stresses the material and formal subordination of the statutory norms to the constitutional norms. The next two regarding reasonableness and the hierarchy of constitutional values are specific types of subordination of political discretion<sup>43</sup>. While the first two can be found in the deconstitutionalized legal order, although only for subordination within the minimum scope of constraints and not for directing political discretion, the following two assumptions are typical for the constitutionalized legal order. Finally, the last three assumptions in this group are formulated in “only if” form because they direct those following these assumptions (judges) to recognize the “correctness” of the statutory norms only if the above-mentioned conditions are fulfilled: formal and material hierarchy of norms, reasonableness and hierarchy of the constitutional norms. Of course, these three conditions can conflict with each other. This shows that additional assumptions exist on the resolution of these antinomies but they are not the key assumptions for recognizing constitutionalized practice<sup>44</sup>.

Apart from the meaning “the main source of law”, which refers to the supremacy and the primacy of the norms produced by that source, the term could also refer to the main source of norm creation. Through history, some legal systems considered custom-setting practices as the main source of norm creation; in the common law countries, it is said that precedent-setting decisions occupy the place of the main source or at least share that place with the statutes, while in the civil law world this place is, at least according to the theoretical positivism of the 19<sup>th</sup> century, said to be reserved only for the statutes. The main source of law in this context could mean two things: there is practice (or there are several practices) through which most of the

<sup>42</sup> A formulation of the conformity of legal norms with a “hierarchy of constitutional values” presupposes the following description of a situation in which this assumption could be applied, and two additional assumptions. A statutory norm can refer to two constitutional norms that are partially overlapping in the field of application, whereby the first constitutional norm is the basis for the statutory norm, and the other is the basis for a norm that requires the opposite of that which is prescribed by the statutory norm. In this situation, the following two assumptions apply. According to the first assumption, the legal norm is in accordance with both constitutional norms if the first constitutional norm in this case is a special norm and the other is a general norm. According to the second assumption, the constitutional norms are in the relation of a special and general norm if the values protected by the first constitutional norm are hierarchically higher than the values protected by the second constitutional norm. From these assumptions it follows that in this situation the constitutional norms are in a special-general relation, and the constitutional values are in a higher-lower relation. Since, according to the second assumption, the constitutional norms are in a special-general relation due to the higher-lower relation of constitutional values, it can be said that the legal norms must ultimately be in accordance with the hierarchy of constitutional values contained in the constitutional norms. The term “hierarchy of constitutional values” can be used for the purposes of this paper in the said way without entering into further discussion of the difference between or identity of constitutional norms and constitutional values. For a claim on the identity of the concepts of principles and values, see: ALEXY 1988, 145. On the criticism of this claim see: BENVINDO 2010, 305-329.

<sup>43</sup> Both of them are the valuation activity of the judge which can be influenced by her view of justice. “Reasonableness” can be perceived as a constitutional value.

<sup>44</sup> The reader can omit reading the list of the assumptions mentioned here without missing the main point that constitutionalized practice is determined by theoretical assumptions which cause a change in the characteristics of constitutional norms. The reason why the theoretical assumptions as well as interpretative directives (section 7) are listed in detail in this article is the aim to present a core for further research on the existing practices of constitutionalization in some particular legal orders. The list is framed to be as simple as possible and to cover the greatest number of the assumptions and interpretative directives which are relevant to reveal constitutionalized practice.

substance of the legal system is regularly produced; or there is practice for directing the regular production of the substance of the legal system.

Therefore, the question of the constitution as the main source in this context is the question of norm creation or, more precisely, the question of changing the legal system, which brings us to the following consequence of constitutionalization.

#### *6. The second consequence of (de)constitutionalization: a change in the mode of changing the legal system*

We have seen that the first consequence of constitutionalization is a change in the characteristics of the constitutional norms. The second consequence is the transformation of the mode of changing the legal system which is closely connected to the last-mentioned meaning of the constitution as the main source of law.

A change in the legal system can be defined as adding a new norm to or eliminating a norm from the existing system of norms<sup>45</sup>. What does it mean when we say that the constitution is the main source for changing the legal system? Since the constituent power for the creation of the first constitution no longer exists after it establishes the first constitution, this body cannot be said to regularly change the legal system. It is true that the organ for amending the constitution can introduce new changes; however, this happens rarely. Who then changes the legal system on a regular basis by applying the constitution? The parliament is the body which regularly changes the legal system through the ordinary statutes and it could perform this function by applying the constitution. Whenever deciding on a new statute, the parliament could, through the interpretation of the constitution, apply the constitutional norms as the directing norms for changing the legal system. Although it is possible that the application of the constitution by the parliament could be established as the only way of changing the legal system based on the application of the constitutional norms, this would not be enough to consider the order constitutionalized. There are several reasons for this. First, the supremacy of the parliament would remain, which is considered by the prevailing theories in comparative constitutional law to be a characteristic of classical constitutionalism<sup>46</sup>. Secondly, if we accept Guastini's definition of constitutionalization as the process by which the constitutional norms occupy the entire space of social and political life, it seems impossible to reach such a state of affairs without the involvement of the courts in the process of changing the legal system<sup>47</sup>. Finally, it seems plausible that the practice of the legislator is insufficient for the application of the constitutional norms to direct, among other things, its own political discretion.

<sup>45</sup> GUASTINI 2014, 350.

<sup>46</sup> In comparative constitutional law, the term "political constitutionalism" is introduced with reference to a model of norm changing preferred by some scholars who oppose "legal constitutionalism". The debate on political versus legal constitutionalism can be perceived as the result of opposing theoretical views on the role of adjudication in changing norms: while the first prefer the supremacy of the parliament in changing norms the second prefer the adjudicative-legislative mode of changing norms. On political constitutionalism see: BELLAMY 2007.

<sup>47</sup> We can imagine a legal order in which the legislator is always implementing the constitutional norms in a correct way and in which the addressees of the constitutional norms act in accordance with the correct meanings of the constitutional norms elaborated in the statutes so that the courts do not have to interpret the constitution. On the other hand, the reality of legislation in many European countries is such that the president of the ECtHR has on some occasions asked judges (as well as attorneys and state prosecutors) to implement the ECHR (and that basically means to implement their constitutions) by respecting the principle of subsidiarity. Of course, this would make the work of ECtHR judges easier. In any case, the claim mentioned above on the impossibility of complete constitutionalization without the constitutionalizing practices of the courts is an empirical statement and its truth value depends on the empirical facts which have to be investigated. In this paper we can rely only on some truisms on human nature and some social facts.

A change in the characteristics of constitutional norms implies a change in the mode of changing the legal system. Constitutional norms as legal norms directly applicable for directing political discretion bring constitutional and ordinary judges into the position to change the legal system by adding or eliminating legal norms. According to Guastini, the courts change the legal system when they, for example, refuse to apply statutory norms, set them aside or whenever they add or substitute norms in the legal system<sup>48</sup>. We can add, following Guastini's description of constructive interpretation, that the courts also change the system of norms in other situations, for example when identifying unexpressed constitutional norms from doctrinal assumptions, when interpreting the statute in accordance with the constitution, when forbidding some interpretations of the statutory provisions or when specifying the meaning of the principles<sup>49</sup>. However, for the constitutionalized model of the legal order it is not enough that judges consider themselves to be permitted to participate in the changing of the legal system. The model requires the systematic participation of judges in this process by exploring the need to change the legal system in accordance with the constitutional norms regularly during the adjudication process. This is only possible if the characteristic of the constitutional norms to direct the political discretion of the legislator and other organs producing general and individual norms is conceived as including interpretative directives for judges which can make them feel obliged to be involved in the process of changing the legal system<sup>50</sup>.

While in the constitutionalized model of the legal order the process of changing the legal system depends both on the legislative and adjudicative authorities, the main characteristic of the deconstitutionalized model of the legal order is that the process of changing the legal system depends predominantly, if not solely, on the legislative authority<sup>51</sup>. The process of deconstitutionalization from the point of view of new constitutionalism is completed by the elimination of constitutionalizing judicial practice, although some kind of limited norm-changing could remain. Namely, in both models, the organs responsible for applying the law contribute to change in the legal system. The first reason for this activity of the courts in any legal order is the adjudication itself which can never be limited to a pure formalistic cognition of the meaning of the statutory provision<sup>52</sup>. Nevertheless, this "hidden" changing of the norms by the courts in deconstitutionalized legal orders, if it happens outside the limited scope of the constraints on the legislator, is never justified by the constitutional norms. The second reason is that even in a deconstitutionalized order the courts might be empowered to conduct limited supervision of the statutes within the limited scope mentioned before. However, when comparing the deconstitutionalized and constitutionalized models, the role of adjudication in changing the law becomes qualitatively and quantitatively different and these differences are such that we can consider it a new mode of changing the legal system. Additionally, there is a

<sup>48</sup> GUASTINI 2014, 350.

<sup>49</sup> GUASTINI 2014, 417.

<sup>50</sup> A specific problem for (prescriptive) legal theory and legal practice appears with regard to the justification of the discretion of judges involved in changing the legal system in the light of the fact that they are not elected officials. There are several theoretical approaches which try to provide the answer to the justification problem. For three different approaches to the justification of judgements see: COMANDUCCI 2011, 65-67. Without elaborating the sustainability of these theories, we can say that if judges feel obliged to be involved in the changing of the legal system, the argument of the application of the law will not be sufficient and some other argument will be needed to justify their "duty" to change the legal system.

<sup>51</sup> Barberis describes the term "legislative state" (*Gesetzstaat*) as an indication of the situation in which law is produced only or predominantly by the legislator: once the monarch, today the democratically elected parliament. BARBERIS 2017, 21.

<sup>52</sup> This claim depends on the understanding of interpretation and Guastini's theory of constitutionalization is based on a specific theory of interpretation which is opposed to the (neo)formalistic theory of interpretation. On the neo(sceptic), neo(formalistic) and eclectic approach see: COMANDUCCI 2011, 58.

shift in understanding of the main concepts so that they are not obstacles for the judiciary to participate in changing norms.

The thesis on the qualitative and quantitative differences as well as the thesis on the shift of understanding of the concepts related to the judicial role are the empirical theses which have to be confirmed in researching the real practice of the courts. In this article we can only describe what the intuition on these practices could be.

The qualitative difference exists exactly because of a change in the characteristics of the constitutional norms. In the constitutionalized model, judges systematically participate in the process of changing the legal system in accordance with the constitutional norms by implementing them directly without the interposition of statutory provisions, by implementing them directly in horizontal and vertical relations when deciding on rights and duties and by invalidating unconstitutional norms whereby they use not only the examination techniques of formal and material compliance but also the techniques of the reasonableness of statutory norms and the balancing of constitutional values. The discretionary margin of judges when changing the law increases with the occurrence of constitutional principles and programmatic norms as legal norms<sup>53</sup>. The judges do not only concern themselves with the expressed constraints on the legislator but also how they apply to the constitutional norms. In the deconstitutionalized legal order the characteristics ascribed to the constitutional norms leave the change of the legal system based on the constitutional norms completely or primarily to the legislator. Even if the courts in this kind of legal order are empowered to conduct limited supervision of the statutes, any possible adjudicative change of the legal system which is not based on the existing statutory norms is limited to the minimal scope of the constraints on the legislator, it is aimed only at limitations but not at directing overall political discretion, and the techniques of reasonableness and balancing are not used. This difference between changing norms through constitutionalizing practice and the practice of changing norms which is not constitutionalizing is externally manifested in the specific justification of the courts' decisions as explained in section 7, which exists only in the constitutionalized legal order.

Regarding the quantitative difference, the number of situations for judges which lead to changes in the norms is more significant in the constitutionalized than in the deconstitutionalized legal order<sup>54</sup>. In the constitutionalized legal order, constitutional courts are in a position to consider a change of the legal system whenever they decide on the constitutionality of acts in any area of legislative regulation. Even more critical for the number of situations leading to changes in the norms are the ordinary courts, which are also in a position to consider a change in the legal system due to a change in the constitutional norms' characteristics<sup>55</sup>. Besides the overall number of decisions in which judges actually explore the need for a change in the legal system, the legislative-adjudicative mode of changing the legal system in the constitutionalized legal order is also manifested in the number of crucial decisions influencing political and social relations (e.g. abortion, euthanasia, minorities, torture) which are significant for further development of the legal order. In the deconstitutionalized legal order the number of situations leading to changes in the norms is limited, as is the number of decisions, especially crucial ones, on changing the legal system.

<sup>53</sup> See above, nt. 37. For the view that all constitutional norms are principles see ALEXY 2002, 48.

<sup>54</sup> This is an empirical thesis which is based on the insight of comparative constitutional law scholars. See for example data on the work of some constitutional courts in: GYORFI 2016, 12 f.

<sup>55</sup> Judges in some countries are supposed to use the constitution as the source of law for their decisions. If constitutionalization exists in these countries, the judges will for example start to use the interpretative techniques used by the constitutional courts of some countries to raise the question of constitutionality or to avoid an unconstitutional statutory norm by using an adaptive interpretation of the statutory provisions (it.: *interpretazione adeguatrice delle leggi*). For the use of this method by the ordinary courts see: GUASTINI 2014, 208.

Finally, it is important to notice that the modification of the mode of changing the legal system requires a change in the concepts of sovereignty and democracy<sup>56</sup>. In the model of the deconstitutionalized order the legal system is changed by organs which are elected, while in the constitutionalized order non-elected organs participate in changing the legal system<sup>57</sup>. In the constitutionalized order judges are taken to be legitimized to do so by their function to safeguard fundamental rights<sup>58</sup>. In both constitutionalized and deconstitutionalized models, the opinion of the majority may be disregarded by the organs when changing the legal system. However, while the parliament in the deconstitutionalized order does not have to justify its decisions based on the constitutional norms and it is hard to imagine the parliament issuing justifications precisely like the constitutional court, in the constitutionalized order the justifications of the courts are often based on the constitutional principles guaranteeing rights as the cornerstone for anti-majority decisions<sup>59</sup>. Furthermore, sovereignty can no longer be understood to be represented in the legislative power but, for example, in the constituent power which created the first constitution (it. *potere costituente*)<sup>60</sup>, and judges prevent the legislator from replacing that constituent power<sup>61</sup>.

### 7. The transformation of the legal practice of the courts as a means of (de)constitutionalization

The third element of (de)constitutionalization refers to the means implemented in the process. According to Guastini, constitutionalization is determined by transformations of a) the constitutional framework, b) the legal practices of the courts and other practitioners of law, and c) attitudes. We can consider these elements the means which lead towards the consequence of constitutionalization.

The constitutional framework can be described as consisting of three elements. The first two are constituted by constitutional power-conferring norms while the third is defined by constitutional norms regarding rights and constitutional norms on the procedure of changing the constitutional norms. The first element pertains to the mandate of adjudication in certain political relations, for example, the resolution of conflicts between the state organs or the organisation of a referendum<sup>62</sup>. The second relates to power-conferring rules on constitutional adjudication as the power of the courts (centralized or decentralized) to control the constitutionality of the statutes. The third one refers to the long and rigid constitution. We will consider the constitutional framework to be the means which serves as the obstacle or advantage for the constitutionalizing practices of the courts. The (non)existence and normative content of the first element can support (de)constitutionalized practices and the same could be indicative for the normative content of the second element as long as it refers to the

<sup>56</sup> Luigi Ferrajoli considers that the “constitutionalization” of fundamental rights confers upon every citizen as holders of such rights a place superior to all public and private powers. The powers, public and private, are bound to uphold and guarantee those rights. Sovereignty presents such “common ownership of the constitution” and it belongs to each and every person. The notion of political democracy is broadened. FERRAJOLI 2011.

<sup>57</sup> See GUASTINI 2014, 348 on the anti-democratic character of constitutional adjudication.

<sup>58</sup> As Guastini noticed, constitutional adjudication is supported by the liberal political doctrine of power balancing and the protection of fundamental rights. GUASTINI 2014, 331 and 156. On Ferrajoli’s view on the role of fundamental rights see above, nt. 56.

<sup>59</sup> See GUASTINI 2014, 359. Guastini describes two sides of constitutional adjudication: adjudicative and legislative. From the perspective of the adjudicative function, the constitutional courts provide justification for decisions based on the implementation of the constitution.

<sup>60</sup> GUASTINI 2014, 349, nt. 14 and at 354.

<sup>61</sup> GUASTINI 2014, 347.

<sup>62</sup> Guastini mentioned these two mandates of the constitutional court as the means of adjudicative influence on political relations. GUASTINI 2014, 210 f.

arrangements for constitutional adjudication. The only exception, as mentioned before, is the abolition of the formulated constitutional norms on constitutional adjudication, the rigid procedure of changing the constitutional norms and the rights of citizens. These constitutional changes lead to a deconstitutionalized legal order if constitutionalizing practice does not somehow continue notwithstanding the absence of such formulated norms. The threats of a change to the constitutional framework in any of the three elements can be a tool in the hands of the parliament or constitutional assembly to influence the constitutional court to accept deconstitutionalizing practice. The change of other normative arrangements relevant for adjudication, for instance on the appointments of judges, might be another sign of pressure on the courts to deconstitutionalize their practice.

Guastini's description of constitutionalizing practice refers primarily to the legal practice of the courts. Intuitively this specific focus on the courts seems justifiable. Although the practices of all actors are important for (de)constitutionalization, it seems that the transformation of adjudicative practice is the necessary means of the process, while other practices can support it even though it can happen without them. The following different types and levels of adjudication can be distinguished when describing constitutionalizing practice: judicial review of statutes by the constitutional court or by the ordinary courts in a decentralised judicial review; the constitutional courts' adjudication on constitutional complaints against individual decisions of the courts and other organs; ordinary adjudication performed by the higher courts and the ordinary adjudication of the lower courts. As constitutionalization is described as "the impregnation of the legal order by constitutional norms", all levels and types of adjudication must be included. When talking about the constitutionalizing practice of the courts in this article, we refer to all types and levels of adjudication and do not differentiate between them.

Constitutionalizing practice is externally manifested in the justifications of court decisions. By analysing these texts in a constitutionalized legal order, according to Guastini, we would expect to find the specific doctrinal assumptions and the new style of interpretation. We propose conceiving both components as directives for judges in the model of the constitutionalized legal order. In that case it is possible to compare the directives actually followed by judges with the directives characterising the model of the constitutionalised legal order. The first group of directives could be seen as directives to follow the theoretical assumptions regarding the constitution as the main source of law as previously elaborated in the fifth section. We could name this group the source-related directives (as a specific kind of doctrinal directives). These are directives to judges which refer to the theoretical assumptions on (1) the capacity of the constitutional norms to produce legal effects, and (2) their direct applicability without the interposition of the statutory norms, as well as to the assumptions regarding (3) the subordination of political discretion to constitutional norms.

The second group involves interpretative directives. We will define the term interpretation in the broader sense as legal reasoning, which includes what Guastini denominates as the activity of ascribing the meaning to normative provisions (interpretation proper) and the activity of juristic construction, as well as the activities connected with these two types of interpretation (resolving antinomies and legal gaps)<sup>63</sup>. Both source-related and interpretative directives define a specific interpretative approach and can be called "directives for constitutionalizing interpretation". Since we elaborated the theoretical assumptions on the

<sup>63</sup> These activities include *interpretation proper and* «a set of activities, which are different from, but related to, textual interpretation». CHIASSONI, FETERIS 2016, 561. On the other hand, Ross uses the term "interpretation" for the determination of the meaning of statutory directives (formulated law), while the term "judicial method" denotes a broader activity to include the principles which guide the courts in going from a general rule to a particular decision, including, for example, reasoning by example in the systems in which precedents dominate as the source of law. ROSS 2004, 109-111.

constitution as the main source of law, which can be seen as the content of the source-related directives, in this section we will focus on the interpretative directives.

The components of the new style of interpretation are mentioned among Guastini's five aspects of constitutionalization. They can also be grouped under the same three characteristics ascribed to constitutional norms in the constitutionalized legal order.

The first characteristic of constitutional norms relating to their unlimited capacity to produce legal effects includes the following interpretative directive:

- courts may create unexpressed constitutional norms to resolve constitutional gaps and to elaborate on the constitutional norms (concretize them).

Interpretative directives under the second characteristic of constitutional norms relating to their direct applicability by the courts could be the following:

- courts may apply constitutional norms to determine the meaning of statutory provisions;
- courts may decide which of the possible meanings of statutory provisions comply with the constitutional norms;
- courts may change the legal system to provide conformity of the statutory norms with the constitutional norms;
- statutory legal gaps may be resolved by elaborating on the constitutional norms;
- courts may avoid conflicts between statutory and constitutional norms by adaptive interpretation of the statutory provisions in accordance with the constitutional norms directly applied<sup>64</sup>.

Interpretative directives under the third characteristic of constitutional norms on the capacity to direct political discretion could include:

- courts shall create unexpressed constitutional norms if constitutional gaps enable unlimited political discretion;
- courts shall apply constitutional norms whenever the statutory norms are incorrectly applied or fail to apply constitutional norms;
- courts shall implement the techniques of examination of the material and formal compliance of statutory norms with constitutional norms to test and resolve potential conflicts between the statutory norms and the constitutional norms (if the conflict is not avoided by interpretation in the narrower sense);
- courts shall implement the technique of examination of reasonableness in terms of the compliance of statutory norms with constitutional norms to check and resolve potential conflicts between the former and the latter (if the conflict is not avoided by interpretation in the narrower sense);
- courts shall implement the technique of examination of the balance of constitutional values represented in the statutory norms (balancing) to check and resolve potential conflicts between the statutory and the constitutional norms (if the conflict is not avoided by interpretation in the narrower sense).

While judges are permitted to use the directives on interpretation in the first and the second group, the directives in the third group are commands that must be applied. If they are not

<sup>64</sup> The directives in the first two groups are formulated in the deontic mode "may" because they serve as the instructions to be followed depending on the case when it is required by directives in the third group.

applied, the constitutionalizing practice will fail. In a deconstitutionalized legal order directives pertaining to constitutionalizing interpretation are not accepted among judges. Judges internalize the opposite directives, which confirms the supremacy of the parliament.

### 8. *The transformation of the legal consciousness as a means of (de)constitutionalization*

The transformation of the practice of interpretation is the consequence of the modified use of directives for judges, and this is not possible without a modified attitude towards them<sup>65</sup>. In Guastini's description of constitutionalization, various expressions regarding attitude modification can be noticed, for example: «spread within the framework of legal culture [of certain] ideas»; a modification of «interpretative attitudes towards the constitution: of the courts (especially of the constitutional court), state organs in general and of course, of legal scholars»; «the modification of doctrinal understandings» and «the attitude of judges arising from such an understanding», and the modification of «the attitude of organs constituted by constitutions and political subjects»<sup>66</sup>. These extracts from Guastini's theory show that the modification of judges' attitudes is a necessary element of constitutionalization. Moreover, Guastini also elaborates on political practice and on the attitudes of political actors towards constitutionalization along with the attitudes of citizens.

Since attitudes are an important element of constitutionalization they must also be important for the process of deconstitutionalization. The question arises as to which conceptual tool is appropriate to describe the influence of attitude on the processes. We propose Alf Ross's concept of legal consciousness which he has developed as an integral part of his theory of law. It is based on the idea that attitudes and operational beliefs are necessary elements of practice, and legal practice is accordingly established on attitudes and operational beliefs related to legal directives. Disinterested attitudes towards legal directives are called legal consciousness<sup>67</sup>. There are two points to be considered when arguing against or in favour of accepting Ross's concept of legal consciousness to explain the attitudes of (de)constitutionalization: the methodological and the practical point of view.

From the methodological point of view the difference between legal consciousness and legal culture may be important. It is not the aim of this research to expose the content of their meanings and disputes from the sociological aspect of law<sup>68</sup>. Nevertheless, from the jurisprudential point of view, the difference may be discerned in the following way although not necessarily corresponding to the sociological dispute. Although both terms refer to attitudes, the difference may be ascertained by observing them. The term legal culture may be used to denominate merely the fact that attitudes exist, which is externally observable in the doctrinal works of legal scientists and in judicial decisions<sup>69</sup>. While legal culture might be understood with no introspective aspect, legal consciousness could be perceived as having a psychological

<sup>65</sup> Chiassoni stresses the importance of legal culture for the process of constitutionalization. Constitutionalization through constitutional interpretation, according to Chiassoni testifies to the power of ideas, and specifically to the power of legal "dogmatics" and legal culture over legal texts» (CHIASSONI 2011, 329).

<sup>66</sup> GUASTINI 2014, 189-215.

<sup>67</sup> Chs. 3, 4 and 17 in ROSS 2004.

<sup>68</sup> For a presentation of the use of both concepts and disputes regarding their use see: SILBEY 2001, 8623-8629.

<sup>69</sup> Giorgio Pino has advanced an understanding of constitutionalism as the legal culture. His concept of the legal culture on constitutionalism is the following: a) it includes attitudes, practices, styles of interpretation and argumentation applied by jurists in general; b) the primary source of its cognition is external (legal discourse including judgements), and c) it concerns also the ideas that shall be followed to solve cases (what counts as a legal source, which materials are to be used and in which order in legal reasoning, the manner of the interpretation). PINO 2017, 32.

connotation. In this view, the difference between these two concepts, which could be the reason for legal theorists to reject the concept of legal consciousness, is the methodological dispute.<sup>70</sup> However, the concept of legal consciousness developed by Ross can be considered his particular way of referring to the internal point of view of the legal phenomena,<sup>71</sup> which is common ground for analytical jurisprudence.

From the practical point of view, the concept of legal consciousness could be utilized for developing the theoretical ground for sociological research. The constitutionalizing practices of courts can be explained as the attitudes of judges regarding source-related and interpretative directives. Moreover, these attitudes can be explained as influenced by attitudes towards the consequences of constitutionalization. It is true that we can research some of these attitudes through the acts of judges and other actors relevant for constitutionalization, but there is no reason to believe that these acts are not influenced by disinterested attitudes which can also be researched. We can limit legal theorists' interest only to judicial acts and to the interpretation and argumentation connected with them, but there is no reason to reject the possibility that other explanations can complement the elaboration of legal decisions. We can consider these explanations the job of other "specialists" dealing with law, i.e. legal sociologists, but there is no reason for legal theory not to make conceptual bridges, as Ross did, towards possible sociological research of legal phenomena.

## 9. Conclusion

Based on the elements of Riccardo Guastini's theory on constitutionalization, we have proposed to consider constitutionalization and deconstitutionalization to be reverse processes which lead to opposite consequences by means of enabling or disabling specific practices of courts under the influence of the legal consciousness. These practices can be encouraged or discouraged by a change in the constitutional framework. The consequences of these process can be described from the point of view of legal system theory as a change in the characteristics of legal norms and the mode of changing the legal system. The theoretical advantage of the conceptual endeavour presented in this article is a more detailed analysis of Guastini's theory on constitutionalization and an introduction to the concepts of deconstitutionalization and legal consciousness which supplement his existing insights. The practical results of the analysis provide a theoretical tool suitable for use in empirical research in this field based on a detailed analysis of the content of the courts' constitutionalizing practice proposed in this article and the corresponding structure of the legal consciousness which can be tested.<sup>72</sup>

<sup>70</sup> Guastini differentiates between interpretation as a process and interpretation as a result. GUASTINI 2014, 375. In the same vein, Comanducci differentiates two descriptive enterprises in judicial practice: a description of the mental activities of judges and a description of the linguistic entities produced by judges. According to Comanducci, the first one requires a psychological and/or sociological method of research. COMANDUCCI 2000, 468.

<sup>71</sup> For a comparison of Hart's and Ross' approach to the internal point of view see HOLTERMANN 2017. Holtermann finds that the «[...] fundamental disagreement lies not in their respective phenomenological descriptions of the internal aspect *per se* [...] the crucial difference between Hart and Ross lies precisely in the methodological conclusions they each draw from this. Or fail to draw». HOLTERMANN 2017, 46. According to Ross, the legal consciousness is like the sense of morality applied to the social norm (ROSS 2004, 369), and in that sense it plays a specific role in his consideration of the internal aspect of legal rules.

<sup>72</sup> The content of constitutionalized practice can be empirically tested by exploring the justifications of existing court decisions and through sociological methods for exploring the legal consciousness in a similar way to research in legal sociology. An analytical tool could be developed based on the doctrinal and interpretative directives presented in this article.

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