

“Backsliding into Authoritarianism in Europe? Reflections on Hungary and Romania”

Constitutional Transitions & Global and Comparative Law Colloquium:

Emerging From / Sliding Back into Authoritarianism

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Summary of Remarks

Constitutional Amendments and Departure from Democratic Rule

(can a “lawfully adopted” constitutional amendment be, nevertheless, “illegitimate”?)

1. Democratic transitions constitute complicated processes which cannot be regarded as a one-way street. There are numerous temptations to depart from democratization or, at least “to adjust” it to the specific situation of a particular country. On several occasions, history has demonstrated that democracy may easily be replaced by dictatorship. Usually such dictatorship imposed by force, i.e. unlawfully. Less trivial are situations where the departure from democratic rule takes place within democratic structures of government and finds its origin in free elections. In such a scenario, the departure is more gradual in nature and takes place throughout the subsequent decisions of bodies and institutions which are constitutionally entitled to revise the existing structure. In other words, the change cannot be regarded as unlawful, but the question is when and how it may, nevertheless, become entirely incompatible with universal standards, i.e. illegitimate.

Such processes of technically lawful, but substantively problematic changes are not foreign to the post-communist countries in Europe, even to those which, like Hungary, have always been regarded as champions in democratic transformation. I am not going to enter into the question of “why”, since the question of “how” is also very interesting. It seems that democratically mandated departures from democracy tend to respect civilized procedures of decision-making, at least up to a certain point. In Europe, this respect is additionally enforced by supranational organizations (like the EU and the Council of Europe) to which all of the countries in question belong.

Constitutional amendments or – preferably – the adoption of a brand-new constitution represent one of the most attractive instruments of change. It is very difficult to challenge the legitimacy of a constitutional instrument which has been adopted in full respect of the required procedures. While it is very rare that free elections produce a parliamentary super-majority which can revise constitution at will, this is exactly the present situation in Hungary and it is not astonishing that the ruling party is making an extensive use of these revisions.

2. Two ways of using the amendment power by the Hungarian super-majority can be distinguished. In the first period, which preceded the adoption of the 2011 Constitution, numerous amendments revised the text of the existing Constitution. In sum, the amendments introduced such deep modifications that the basic structure of the existing Constitution was

affected. The adoption of the new Constitution somehow “convalidated” the excessive use of constitutional amendments, but the structure of the new instrument was problematic, given that several basic solutions were hidden in the separate constitutional law on transitional provisions. Finally, it was soon realized that the new Constitution was not sufficient to continue the changes and several constitutional amendments were also adopted after 2011.

The function of some of those amendments seems to be problematic. While it is clear that a democratically elected parliament has the power of amendment, questions emerge when the use of that power takes a purely instrumental application. In my opinion, the legitimacy of a – lawfully adapted - constitutional amendment may be challenged if its real function is that of entrenchment or nullification.

The entrenchment abuse arises where matters which traditionally have been regarded as belonging to ordinary statutes are “elevated” to the constitutional rank. It may be dysfunctional, as constitutions are not trash-cans and too many detailed regulations may negatively affect the internal logic and value-oriented identity of those instruments. However, and this is the main preoccupation, such regulations may also impinge on the legislative powers of future parliaments. If future elections will not provide one party with a super-majority, the new parliament will be confronted with a “petrified” set of provisions which are constitutional in rank, but statutory in substance. In effect, the legislature will be deprived of the possibility to legislate on matters which should be left for its decision.

The nullification abuse arises when the principal aim of constitutional amendment is to overrule the Constitutional/Supreme Court’s finding that a particular statutory provision is unconstitutional. Although the power of constitutional amendment may be regarded as an ultimate solution of the “counter-majoritarian difficulty”, it must not be used in an unrestrained manner. Particularly, in situations where constitutional amendments are not limited to a substantive regulation, but directly provides for annulment of judicial decisions, the power to amend invades the sphere which must remain in the exclusive province of the judicial branch.

3. The abusive practice of constitutional amendments gives rise to political and academic criticism. But, there should also be a legal remedy capable of providing a bar to arbitrariness of the current super-majority.

On the one hand, the concept of “unconstitutional constitutional amendment” seems to gain attractiveness in both constitutional theory and judicial case-law. Today, several constitutional/supreme courts (the Hungarian one included) are ready to accept that constitutional amendments are not immune from judicial review and that the review extends not only to the procedural regularity of the amendment process, but also to the substance of the constitutional amendments. This trend merits academic support and encouragement.

On the other hand, in the supranational context of Europe, national constitutional amendments must remain compatible with the European Convention on Human Rights as well as with EU law. There are some, albeit indirect, possibilities to challenge a national constitutional amendment before the Luxembourg Court as well as before the Strasbourg Court. The judicial review of “conventionality” of constitutional texts (as the powers of supranational courts are not

limited to the amendments) may provide some remedies, particularly in the area of individual rights and judicial independence. There have already been cases (from Germany, Turkey, Hungary, Lithuania and Bosnia and Hercegovina) involving constitutional texts and it may not be without merit to encourage both of the European Courts to elaborate their jurisprudence on that field.

Professor Jan-Werner Müller
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Summary of Remarks

Is the EU legitimated to intervene in its Member States to protect liberal democracy? I argue that, empirically, the EU has long been authorized by Member States to perform such a role. I also argue that, quite apart from evidence contained in the treaties, an EU role is supported by democratic theory: the all-affected principle might in general be problematic, but in the EU it can do real work to legitimate EU measures to isolate a Member State whose liberal-democratic credentials have become doubtful, and even to legitimate intervention within the state concerned. But when and how? I propose four criteria as to the “when” question: a government needs to have an actual track record of violating fundamental European norms (unlike Austria in 2000); its actions need to have a systematic character (everyone can make one-off mistakes, and the European courts -- both ECHR and ECJ -- remain well equipped to deal with them); partisan preferences are made irreversible by a government (for instance, by being entrenched in a constitution); there is little hope for liberal-democratic self-correction within a Member State (as there was, for instance, in Italy under Berlusconi). To be sure, these are matters of judgment, not matters of ticking off boxes on a rule of law checklist. But who is authorized to make such judgments? I propose an independent body of experts, modeled on the Council of Europe's Venice Commission, but EU-specific and not just containing lawyers. This body could regularly monitor Member States, build up country-specific knowledge, and be pro-active. It should be clearly visible in a polity characterized by high degrees of political fragmentation and a weakly developed public sphere; if it triggers an alarm, it should generate significant attention. And upon its recommendation the European Commission ought to cut EU funds to the country in question. Existing mechanisms -- especially Article 7 TEU -- should stay in place, but be complemented with an option to expel a member State altogether. There remain significant worries about agency design and the 'rule of law of the rule of law' -- making judgments, i.e. not just mechanical rule-application, is inevitable, but how to avoid judgments that could seem overly subjective? That is a real worry -- nationalist backlashes in Member countries are less so, because governments bent on violating fundamental EU norms will stir up anti-EU sentiment anyway. And doing nothing is not neutral -- inaction on the part of the EU would disappoint all those citizens who wanted to lock their country into the EU in order to prevent a return to authoritarianism or illiberal forms of democracy.

Professor Wojciech Sadurski
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Summary of Remarks

After the accession of eight Central and East European states (CEE) to the EU, there were two alternative theories on the table: a “backsliding” theory and the “Euro-straitjacket” theory. The backsliding theory (best exemplified by a set of articles in the *Journal of Democracy*, Vol. 18, No. 4, October 2007) proclaimed that after a period of self-imposed discipline and un-natural liberal consensus required for EU conditionality at the stage of candidacy, the CEE societies would fall back into a more usual state of affairs, involving rampant authoritarianism, populism and absence of the rule of law. This corresponded not only to an account of the internal situation in CEE states, but also to the fact that while the EU has powerful conditionality-related leverage for a *candidate* state’s democratization, it lacks any effective means of monitoring and enforcing democratic standards *after* accession. The opposite “Euro-straitjacket” theory (which I myself largely shared) expressed a measure of optimism about the long-term and stable positive effects of accession for CEE states as far as consolidation of democracy was concerned: not only does the EU provide a strong mechanism for democratic socialization and norm enforcement, but it also greatly privileges the position of democratic-liberal political forces within member states, so that as a result the democrats become relatively stronger and autocrats become more liberal.

A wave of events in recent years, mainly in Hungary and Romania (*nota bene*: these are qualitatively different cases and should not be placed in the same category, other than at the broadest level of abstraction!), ironically perhaps, have corroborated *both* of these theories. Support for the backsliding theory emerged from the fall of a “liberal consensus” (cf. Ivan Krastev) that gave way to the populist temptation, as the accession-related discipline dissolved into open resistance to the values of rule of law and rights-based democracy. However, the developments also corroborated the Euro-straitjacket theory: populists like Victor Orbán and Victor Ponta had to adopt the EU rules of the game and “explain themselves” in terms of their actions, in a manner that (at least ostensibly) made sense in the EU political language, and try to show that they are good European citizens, acceding in good faith to the EU constitutional norms. While many of us saw these explanations as disingenuous, the very fact that this was the language in which, for instance, Hungarian constitutional changes were defended to the outside world by their proponents, has been a powerful indication of the domination of EU-aligned political and constitutional norms.

But what about a more direct and effective intervention of the EU in preventing, or arresting, the authoritarian turn in Hungary? While there have been some strong political signals sent to Budapest about the *cumulative* effect of troubling constitutional and legal changes (each of which, taken in isolation, may find some equivalents in various other EU member states), with the Tavarez Report being the most impressive and sound indictment, the steps taken so far have shown, in a rather painful way, clear limits of the EU’s willingness and capacity to intervene. I would prioritize “willingness” over “capacity” because, in my view, this is precisely the situation

in which the weaker device of the Article 7 process can and should be employed, namely, the preventive mechanism that leads up merely to “determination” of a “clear risk of a serious breach” of Article 2 TEU principles, principles which include democracy and the rule of law. The Tavares Report makes only a meek gesture towards Article 7 in paragraph 86.

While it is unlikely that this procedure may be triggered by one-third of the member states or even by the Commission, the European Parliament (a third actor authorized to take such an initiative) seems the appropriate body to do so. I had argued, some years ago, that the introduction of the Article 7 mechanism in the constitutional structure of the Treaty can be understood mainly in the context of the (then) imminent enlargement of the EU upon Eastern Europe (“Adding a Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider”, *Columbia Journal of European Law* 16 (2010): 385-426). With some delay, the reason for such a trigger unfortunately *has* occurred. To self-quote from my blog entry on the topic: “For, if not now – when? What else may happen in a member state which may be properly seen as ‘a clear risk of a serious breach’ of principles of democracy, human rights and the rule of law?”. Some people argued that the only value of Article 7 is that it *is there* – but that it will be never used (just like a nuclear weapon). I disagree: a weapon which will never be used, and that everyone knows will never be used, loses its deterrent function. The non-use of Article 7 in the Hungarian case may have a broader, demoralizing effect upon the EU’s willingness and capacity to help protect democracy in its member states.

Professor Kim Lane Scheppele
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Summary of Remarks

All's Not Quiet on the Eastern Front

Since the 2010 elections, Hungary has experienced a constitutional frenzy. In its first three years in office, the Fidesz government amended the old constitution 12 times to facilitate the passage of a new constitution. Once it adopted new constitution, that constitution also saw frequent amendments. At the same time, the government guided the passage of more than 700 new laws, changing everything from the civil code and the criminal code to laws on the judiciary, the constitutional court, national security, the media, elections, data protection, and more – with the votes of only their own party.

Its critics have argued that the Hungarian government has embarked on a plan for keeping the Fidesz political party in power for the foreseeable future and bringing all political and legal institutions under its direct control. As the government has consolidated power in the hands of one party, the [Tavares Report of the European Parliament](#), the [Venice Commission's numerous interventions](#), the condemnation of the [UN High Commissioner for Human Rights](#) and the complaints of a number of international NGOs like [Human Rights Watch](#) and domestic NGOs like the [Hungarian Civil Liberties Union, the Helsinki Committee and the Eötvös Károly Intézet](#) have repeatedly found evidence of systemic violations by the Hungarian government of the basic European values of democracy, the rule of law and protection for human rights.

Why is this happening? I argue that the financial crisis provided both the opportunity and the modus operandi for Fidesz domination of the political arena in Hungary. The global financial crisis hit Hungary about a year before it hit the rest of Europe, pushing Hungary into the embrace of the IMF which insisted on radical austerity program in the year before the elections. The elections tilted toward Fidesz as far as they did because the public was eager to vote out of power the government on whose watch the financial crisis occurred. But once Fidesz took office, it was able to direct the flow of austerity pain toward its political opponents, which is why the opposition has been disorganized and silent while its adherents are fleeing the country. Fidesz has targeted its opponents for defunding, unemployment and targeted increases in prices and taxes, and that has effectively disabled them.

Rather than attribute events in Hungary to a failed democratic transition or an inadequate grasp of European desiderata on the part of the general population, I argue that the financial crisis both speeded the rise of the Fidesz government and gave it the tools it has needed to entrench its power firmly through a legal revolution.

Romania and Bulgaria have seen their democratic governments change hands multiple times in rapid succession after the financial crisis, also because austerity upended politics. But in many

ways, Romania and Bulgaria are very different because no government in either place has figured out how to use austerity's tools to entrench itself forever or to lock in its gains through a constitutional coup. Romania has fragile coalition governments that make it hard for a strong leader to push through a program without endangering the coalition and Bulgaria's financial crisis has brought an energized democratic public into the streets demanding accountability from a succession of weak governments. In neither case have the post-austerity governments been able to create a one-party state as has Viktor Orbán's government in Hungary.