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CONSTITUTIONAL LESSONS FROM
THE PAST AND FROM THE FUTURE

SUMMARY

Since the liberation of Central and Eastern Europe from totalitarian Soviet rule, the so-called “new democracies” have become members of the Council of Europe and adhered to the foundational values – democracy, human rights and the rule of law. More than half of them also joined the European Union, which shares the same foundational values. Practice showed that, since 2000, some of these countries have experienced the deterioration of democratic rule and Rule of Law backsliding, breaching the foundational values of both the CoE and the EU. The lesson to be learned from the past is that, over the past twenty years, there was a decline of constitutional democracy across the whole of Europe, covering even the European Union, the area where it was least expected. Many terms are in use to describe this phenomenon: abusive constitutionalism, populist constitutionalism, bad faith constitutionalism, de-constitutionalism, constitutional retrogression, constitutional rot, constitutional decay, democratic backsliding, democratic erosion, democratic recession, authoritarian backsliding, etc. The institutional independence, primarily, of the Judiciary and Constitutional Courts in a number of these countries appeared to be under a threat from the governing party in political institutions. The tools and mechanisms, existing within the CoE or even the EU and aiming to secure respect for the obligations under both Organisations’ constitutive acts, appeared to be ineffective. Having dealt with some lessons from the past, why not to try to consider yet another issue: can history draw lessons from the future? The future that is still being written: we speak about the war of Russia against Ukraine which ends in Moscow’s defeat. This lesson tells us about the danger and cost of democracies doing business with autocrats and dictators. Nowadays Russian fascism has posed a challenge to all humanity. We live in times of a global struggle between two political systems – democracy and autocracy. Thus, if democracy and the rule of law are global values, the struggle for a future world in which they predominate should be accordingly global, as well. The world needs Ukraine’s victory. As far as national sovereignty and democracy are indivisible, this victory will prove that democracy is the best political system, will confirm the value of freedom, and will give a chance to the whole world safety.

KEY WORDS

Foundational values, democracy, Rule of Law, autocracy, abusive constitutionalism, Constitutional Courts, Russia's war against Ukraine, Ukraine's victory.

INTRODUCTION

The Fall of the Berlin Wall in 1989 marked the liberation of Central and Eastern Europe from almost half a century of totalitarian Soviet rule.

Since then, almost all the countries of Central and Eastern Europe (with Belarus the only exception) have become the members of the Council of Europe, adhering to its foundational values – democracy, human rights and the rule of law – as an obligation under Article 3 of the CoE Statute. Thus, all the so-called “new democracies” agreed to abide by the Council of Europe standards and undertook “to remedy shortcomings in their constitutional, political and legal orders as part of the membership package” (Drzemczewski, 2017, p. 181).

In addition, more than half of the so-called “new democracies” at a later stage also joined the European Union, which shares the same foundational values. For 20 years after the fall of Communism, there was a strong belief that a basic level of democracy, human rights and the rule of law in these countries had been achieved and that the break with the totalitarian past was irreversible (Adams & Janse, 2019, p. 1). There were grounds to believe also that the difference between the so-called “core Western democracies” (from which the Rule of Law originated) and the EU’s newest members regarding the “stability of institutions guaranteeing democracy, human rights and the rule of law” (the so-called “Copenhagen criteria”) had been erased or at least reduced to a minimum.

However, as practice shows, since 2000, some countries of Central and Eastern Europe have experienced the deterioration of democratic rule and Rule of Law backsliding, breaching the foundational values of both the CoE and the EU. Despite declarations that democracy and the Rule of Law are recognised as the only legitimate basis of government, both with respect to citizens and other states, signs of authoritarianism have begun to reappear as authoritarians pretend to be democrats.

THE DETERIORATION OF DEMOCRATIC RULE AND RULE OF LAW BACKSLIDING

Scholars in the field of public law and political science struggle to understand the nature of the evolving threats to a wide range of democratic systems. Many terms have been used to hide contemporary authoritarianism masked as constitutional democracy. This presents a kind of “conceptual bazaar”, involving: abusive constitutionalism, autocratic legalism, populist constitutionalism, bad faith constitutionalism, de-constitutionalism, constitutional retrogression, constitutional capture, constitutional rot, constitutional decay, democratic

deconsolidation, democratic backsliding, democratic erosion, democratic recession, authoritarianisation, authoritarian backsliding, etc. (Daly, 2019, p. 9).

We are talking about a kind of contemporary authoritarianism that is characterised as a “*sui generis* system between constitutional democracy and dictatorship” (Tóth, Gabor A., 2019, p. 37). This sort of system essentially represents a pretended democracy but, certainly, not a genuine one.

The lesson to be learned is that, over the past twenty years, we have witnessed a decline of constitutional democracy across the whole of Europe, covering even the European Union, the area where it was least expected. However, when talking about the EU, we are talking not about the whole region, but only about the developments of “definite decline” of constitutional democracy occurring most acutely in some Central and Eastern European states (Letnar Černič & Avbelj, 2018, p. 1). Indeed, the Rule of Law was established *de jure* in all Central and Eastern European countries. However, in some of them, the efficiency of the Rule of Law in practice was notably limited “due to institutional and policy limitations and wide-spread conundrums relating to the separation of powers, weak institutions and corruption” (Letnar Černič, 2018, pp. 111–137), thus, questioning the matter itself whether law can rule indeed.

Under these circumstances, the Judiciary and Constitutional Courts in these countries have had to find their own institutional independence while under a threat from the governing party in political institutions, which has led to antagonism between them.

The crisis of constitutional democracy is especially worrying in two EU member states, namely in Hungary (Uitz, 2019, pp. 473–478) and Poland (Markowski, 2019, pp. 111–132; Polish Bar Council, National Bar of Attorneys-at-Law, 2019; van Zyl Smit, 2019; Coydash, 2017), where the rise of abusive constitutionalism struck the domestic judiciaries particularly hard and led to a course of systemic undermining of the Rule of Law (Bucholc, 2019, p. 89). Whereas, in the 1990s, both Hungary and Poland were regarded as examples of successful democratic transformations; the situation today has changed. Indeed, the experience of these two countries should serve as a warning about the fragility of institutions of liberal democracy transforms and the ease with which they can be transformed into illiberal ones.

In this context, we observe how political governing majorities in several “new democracies” of Central and Eastern Europe during the last two decades have attempted to exert influence over the functioning of constitutional institutions. Legislative and executive authorities have tried to bring them in line with political objectives, as well as to make them subservient or even to block their work. In this regard, one of the illustrative examples could be a Polish one: “After the electoral victories of 2015, PiS transformed the CT from an effective, counter-majoritarian device to scrutinize laws for their unconstitutionality, into a powerless institution ... the Tribunal became a defender and protector of the legislative majority ... the CT as a mechanism of constitutional review has ceased to exist: a reliable aide of the government and parliament majority has been born” (Sadurski, 2019, p. 63).

There are a number of similar cases in other countries, including, *inter alia*:

– an attempt to actually abolish the Constitutional Court at all: the case of Georgia in 2002) (Drzemczewski, 2017, p. 182);

– the “tactic” of budget reduction for the Constitutional Court: the case of Bosnia and Herzegovina in 2004 (Venice Commission, the press release “Budget of the Constitutional Court – a determining factor of its independence”, 2004);

– non-appointment of judges of the Constitutional Court: the case of Ukraine in 2005 where the *Verkhovna Rada* refused to accept the oath of 11 judges of the Constitutional Court elected/appointed by the Judiciary and the President, which led to a constitutional crisis whereby the CCU became inoperative for one year and a half (Venice Commission, Opinion CDL-AD(2006)016, §§ 19, 21);

– packing the Constitutional Court: the case of Hungary in 2012 where the 2012 constitutional amendment led to an increase of the membership of the CC from 11 to 15 members resulting in packing the Court “with judges supportive of the governing majority’s agenda” (Hungarian Helsinki Committee, 2015);

– the dismissal of judges of the Constitutional Court: the case of Moldova in 2013 where the Parliament was asked, by a “displeased” governmental majority, to enact a law, by a simple majority, for the dismissal of a judge who no longer had the “trust” of the Parliament; two readings of the text were pushed through the Parliament in one day; the VC President intervened to bring this procedure to an abrupt halt; the President of Moldova did not enact the law and the CC itself later found the law to be unconstitutional (Drzemczewski, op. cit., p. 182);

– the non-implementation of judgments: the case of Poland where, in 2016, the Government refused to publish the judgments of the Constitutional Tribunal in the Official Journal (Venice Commission, Opinions: CDL-AD(2016)001, § 43; CDL-AD(2016)026, §§ 74–101);

– the irregular appointment/election of a duplicate judge of the Constitutional Court (“doubler”/“understudy”): the case of Poland where a judge was appointed in December 2015 to an already filled judicial post (European Court of Human Rights, the case of *Xero Flor w Polsce sp. z.o.o. v Poland* (application no 4907/18), the judgment of 7 May 2021).

These and some other methods (Drzemczewski, 2017) had the effect of undermining the independence of the constitutional courts to the extent that they could not perform their constitutional role as the guardian of democracy, the rule of law and human rights.

But if we speak in general, then it is unlikely that we will not be right in saying that *Realpolitik* has proven that the tools and mechanisms, existing within the CoE or even the EU and aiming to secure respect for the obligations under both Organisations’ constitutive acts, appeared to be ineffective. And this is also the lesson.

The CoE and the EU have employed various tools and instruments to try to secure respect for the obligations by these states under both Organisations’ constitutive acts, with varying degrees of success. This situation, however, goes to the core issue of the values and principles that bind EU Member States. It leads us to continue searching for answers to a number of existential questions: whereas democracy, human rights and the rule of law are the values upon which the Council of Europe and the European Union are based, and these values constitute the common constitutional tradition of a united Europe, do the ways of living of all European peoples support democracy and the rule of law? Are there certain ways of living of certain peoples in Europe that do not support democracy and the rule of law? Is it the

surge of populism that has put the rule of law and liberal democracy under great stress and danger? Are there differences between East and West still preserved in a united Europe? If so, what lessons can be drawn regarding the demands imposed on candidates by the EU in future enlargement rounds?

These are some of my reflections on *the lessons from the past* that do matter for the future.

Now, I propose to consider yet another issue: can history draw *lessons from the future*?

I mean lessons from a future that is still being written. A future where Putin's unprovoked invasion of not only Ukraine (e.g. the war of Russia against Ukraine in which he is determined to fight to the last Ukrainian), but of European democracy in general, ends in Moscow's defeat. When Ukraine wins, one of the powerful lessons will be:

Bystanders will realize that democracy is not weak but provides the legitimacy, solidarity, and steadfastness necessary for victory ... The world will also see that the United States, its European allies, and their democratic partners will sacrifice to help an embattled democracy defend itself and to reaffirm the most vital principle of international order, that territorial aggression will not stand. Finally, it will demonstrate the disastrous incompetence and miscalculation of Putin's authoritarian state and thus illustrate a larger lesson: when leaders are not constrained by checks and balances and alternative flows of information, they are prone to ruinous blunders (Diamond, 2022).

Yet another lesson tells us about the danger and cost of democracies doing business with autocrats and dictators. About the fault of Western democracies that did not react in a timely, accurate and effective manner to a whole series of aggressions committed by Russia in the past. It is not only about the annexation of Crimea and the occupation of part of Ukraine's territory in the east in 2014. It is also about an even earlier Russian aggression against Georgia, even earlier Russian interventions into Syria, Venezuela, etc. As a result, we are living in a world in which international institutions turned out to be ill-equipped or unwilling to maintain democracy, human rights, the rule of law, peace and security, which are their *raison d'être*.

Among such institutions, first, there are the United Nations and the Council of Europe, both of which were founded under the slogan "Never Again". However, *it did happen again!* That is why, more than ever since the time when the UN and the CoE were founded, the words of Winston Churchill – one of the Founding Fathers of the Council of Europe – are relevant. 76 years ago, at the University of Zürich on 19 September 1946, he said: "The League [of Nations] did not fail because of its principles or conceptions. It failed because those principles were deserted by those states which brought it into being, because the governments of those states feared to face the facts and act while time remained. This disaster must not be repeated" (Churchill, 1946).

The disaster has repeated itself. And it continues. Primarily because Ukraine was attacked by Russia, a Eurasia's most expansionist and aggressive autocracy, to stop its inexorable thirty-year independent European democratic trajectory. Today's Russia is a terrorist tyranny, aptly expressed as "*rushism*" – a specific modern form of fascism rooted in *Bolshevik* totalitarianism.

Ukrainian resistance to *rushism* is a confirmation of the fidelity of the Ukrainian nation to the principles of democracy and its future. Prof. Timothy Snyder of Yale University has justly said that “Ukraine holds the future” and that “this war is about establishing principles for the twenty-first century”; that “it is about policies of mass death and about meaning of life in politics”; that “it is about the possibility of a democratic future” (Snyder, 2022).

Russian fascism has posed a challenge to all humanity. We live in times of a global struggle between two political systems – democracy and autocracy. As Joseph Borrell more precisely stated at the EU Annual Conference of 2022, “there is a fight between the democratic systems and the authoritarian systems. But authoritarianism is, unhappily, developing a lot. ... There is an authoritarian trend. Sometimes, they are still wearing the democracy suit, but they are no longer democracies” (Borrell, 2022).

The latest snapshot of state of democracy worldwide entitled “Frontline democracy and the battle for Ukraine” shows convincingly why the outcome of the Ukraine’s fight, indeed, matters very much for democracy globally and, in particular, for the principle of national sovereignty, which is considered as “a bedrock of democracy” (Economist Intelligence Unit, Democracy Index 2022).

CONCLUSION

Thus, if democracy and the rule of law are global values, the struggle for a future world in which they predominate should be accordingly global, as well. However, that struggle continues here – in Europe, in particular, in Ukraine, which is suffering a genocidal war. The outcome of this war, indeed, matters for democracy and the rule of law. The world needs Ukraine’s victory. Only Ukraine’s victory will stop the crimes unseen since 1945. Only this victory will restore the undermined international law and order. Only it will save the peaceful European project. And Ukraine’s victory will prove that democracy is the best political system. This victory will also confirm the value of freedom. Ukrainians by their lives prove that freedom is the right to be themselves. Ukraine’s victory will give a chance to the whole world for freedom and safety.

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