How to Save a Constitutional Democracy: a Comment by DIETER GRIMM

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While Bruce Ackerman is publishing a book on the rise of world constitutionalism, Tom Ginsburg and Aziz Huq ask themselves how a constitutional democracy can be saved from erosion or decay. The coincidence is telling. Toward the end of the 20th century, constitutionalism seemed to have established itself as universal model for legitimating and regulating public power. This has come with a growing willingness to enforce constitutional norms vis-à-vis power-holders. Almost all countries that adopted new constitutions or revised old ones after 1990 provided for some form of constitutional adjudication. In the 21st century, however, attempts to transform constitutional democracy into authoritarian systems by amending or circumventing the constitution and by curbing or packing constitutional courts occur in a number of countries, even in member states of the European Union.

Ginsburg and Huq analyze the processes of democratic backsliding and perverting democratic constitutionalism in various countries and ask whether an intelligent constitutional design would be able to prevent this from happening or make it at least more difficult. They do so not out of pure academic interest, but with the intention to protect liberal democratic constitutionalism because they believe it to be morally superior to alternative models, some of which are briefly discussed (such as the "Singapore model").

The analysis presupposes a notion of liberal democratic constitutionalism so that one can know at what point of transformation a country departs from the model. The authors name three core elements of democratic constitutionalism without which a regime cannot claim to adhere to constitutional principles. These elements are, first, free and fair elections, secondly, speech and association rights that guarantee political participation and a free discourse, finally the rule of law. This is a rather thin notion of liberal democratic constitutionalism, yet deliberately so. The definition aims to be "as minimalist as possible without simply equating democracy with elections alone". By this narrow definition the authors hope to evade the problem that democracy is a contested notion, probably in vain since much of the destruction of liberal democratic constitutionalism is justified in the name of democracy.

However, for the purposes of the book, it is in principle justifiable to apply a thin notion. The book is not about determining an ideal type of liberal democratic constitutionalism, but about defining below which threshold a country may not fall without ceasing to be a liberal democratic state. Nevertheless, one may have doubts as to whether it is not too thin a notion. It is difficult to imagine a democracy without elections, but elections are not sufficient to qualify a regime as democratic. Rather, elections and the elected bodies and office holders must be embedded in an ongoing political process so that democratic life does not exhaust itself but culminates in elections. In particular, the losers of an election must enjoy the freedom to compete with the majority and have a chance to become a majority themselves in future elections. The authors do not deny this but want to secure meaningful elections by guaranteeing basic rights to free speech and free association. Yet, like elections, these rights have preconditions. In order to fulfill their purpose, they ought to be grounded in rights to personal freedom and privacy at the least. Without this, speech and association rights remain endangered and risk to be reduced to a function of democracy. Moreover, as individual rights they are not enough to guarantee a fair treatment of the opposition within parliament. Finally, the rule of law, understood as

compliance of government with the laws of the country, is of little value as long as government is free to use the legislative power at will and enforcement mechanisms are lacking.

The main part of the book is divided in two sections, one where the ways out of liberal democratic constitutionalism are described, and one where possible safeguards against transforming a democratic state into an authoritarian system are considered.

In the first part, the authors analyze a number of countries where democratic backsliding can be observed in recent years. They distinguish between a fast and a slow track away from liberal democratic constitutionalism. The fast track, called "democratic collapse", leads to more or less authoritarian systems of government, and it does so in a rather brief period of time. It usually happens by way of using emergency powers or by a military coup. The transition from the Weimar Republic to National Socialism stands for this track. In the authors' view, however, it is „yesterday's instrument against democracy". Nowadays, there are more subtle means to transform a system. The slow track is called „democratic erosion" and comes in two forms, either through a take-over by a charismatic populist leader or by „partisan degradation", either because of a failure of a whole party system or by an electoral success of one party, which makes it invulnerable to rotation. Both forms are analyzed in detail, and one can see that the basic pattern repeats itself more or less in different countries. The authors identify a tool kit that consists of constitutional amendments, the elimination of institutional checks on the majority, centralizing executive power, shrinking the public sphere and eliminating competition.

These instruments of destroying liberal democratic constitutionalism inform the second part where ways and means to save constitutional democracy against attacks are discussed. The authors concede that, once a political party has obtained the majority necessary to amend the constitution, the battle is lost. Here, constitutional design no longer helps and everything depends on whether the population tolerates the system change or revolts. The emphasis of the chapter is therefore on preventing a take-over by authoritarian forces from happening or by making it difficult for them to implement their goal after having won an election. However, they hesitate to recommend the earliest protection against democratic collapse or decay, the concept of militant democracy with its strongest component, the permission to ban anti-democratic political parties because they deem the risk for democracy greater than the benefits. Special attention is given to the United States. Although the authors do not hold back with their criticism of American democracy, especially in the south of the country, they locate the US still within the group of liberal constitutional democracies. Nevertheless, they include the United States when it comes to developing remedies against democratic backsliding.

The list of suggestions is quite long. They are beyond doubt helpful and when cumulated they may well make a populist take over less likely. However, once it has happened they seem too petty to hinder a charismatic populist leader or a populist party to transform the system into an autocracy. Even if many loopholes are filled, the government still retains the power to appoint office holders. The institutions and procedures may be designed as carefully as possible and provide for intermediate bodies for the selection of persons; yet, this will be of little help if the ruling party can fill the positions of controlling bodies, such as courts, magistrates' councils, ombudsmen, media commissions etc. with its own followers and when thereby and by legislation they succeed in bringing the media on government line. Ultimately the question is always whether the citizens are willing to tolerate the change or resist.

However, this does by no means affect the value of the book. It is timely and useful. It profits from the immense comparative resources on which the authors can draw. Some forty countries appear in the book, seven figure prominently in a list featuring the mechanisms of constitutional backsliding. The categorization is convincing, even if some borderline cases may be less clear than depicted. The analysis of the various cases as well as the discussions of remedies is extremely rich. It shows what a country at the verge of a take-over has to expect, as in spite of the differences

between various countries certain patterns repeat themselves in almost all cases. The irony of such a book is, inevitably, that attackers and defenders alike can use it for their purposes. But this should not be understood as an argument against its publication.

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