Oblique Strategies

Rumors of a Constitutional Coup in Hungary

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On June 25, 2021 Hungary's two top judges – the president of the Constitutional Court, Tamás Sulyok and the chief justice of the Kúria, András Varga Zs. – warned attendants of a conference on the Fundamental Law of an impending constitutional coup. They were addressing the nation's legal elite – including the speaker of the Parliament, the Minister of Justice and the Prosecutor in Chief – on the premises of the Kúria.

Without offering details on the plot or on the identity of its architects, Chief Justice Varga Zs. said that a constitutional coup would breach the sovereignty of the Hungarian state. For his part, President Sulyok confirmed that such attempts were outside the legitimate public discourse and reassured the audience that the Constitutional Court would show zero tolerance. And so the guardians of the Fundamental Law activated the language of militant democracy ahead of the 2022 elections.

Such oblique references are unlikely to shift attention from the Hungarian government's war on LGBTQI+ rights on the international scene. Yet, they inspire a search for the enemies of the constitutional order within, starting in legal circles.

Potential marks are aplenty — and are out in the open. The usual suspects include civil society organizations that regularly challenge the government's constitutional, legal and policy choices. Outside the war on gay rights, a recent highlight is the UN special rapporteur's inquiry into the appointment of Chief Justice Varga Zs. to the Kúria that was made possible by bespoke adjustments to the applicable legal framework. As before, when the independence of the judiciary was put in peril Amnesty International and the Hungarian Helsinki Committee acted as watchdogs do in a constitutional democracy and made use of supranational safeguards.

Another potential plotline is the one outlined by prominent lawyers and public intellectuals (including a former justice of the Constitutional Court and a former Minister of Justice) in an essay for a now-online newspaper, Népszava. The authors urge the united opposition to run on a platform of constitutional transition — back to constitutional democracy and the rule of law (in the ordinary sense of these terms). They argue that the Parliament elected in 2022 could declare the Fundamental Law null and void (with simple majority) based on Article C(2) which provides that none shall aim to exclusively possess constitutional powers. In this scenario the Parliament would exercise constitutional review powers, temporarily acting in the capacity of the Constitutional Court, until a new constitution is put in place. Thus, while this may be a recipe for replacing the Fundamental Law, it is hardly a secret plot — and it relies on means provided by the Fundamental Law itself.

On reflection, it appears that the recent coup-mongering is not so much a play to save the Hungarian constitutional order from a secret plot, but one of judicial self-defense. Hungary' top judges are eager to show that they have something useful to offer to the regime (beyond protecting Hungary's constitutional identity) before the 2022 elections.

Illiberal and authoritarian regimes are known to rely on their courts to improve their resilience. Deploying the tools of militant democracy against the political opponents of incumbent office holders, of course, would not be unprecedented. Whether protecting constitutional identity from external invaders or the unamendable constitutional core from internal change, such tools are susceptible for abuse in the hands of the judiciary.

Senior Hungarian judges are now experimenting with novel ways of civic mobilization in defense of the constitutional order. The warning about a secret plot for a constitutional coup may have been addressed to the legal profession, yet, ultimately it depends on the active engagement of the political community as a whole. The legal profession – and the courts – will only be in a position to defend the constitutional order from an impending coup if citizens are vigilant, if they monitor, record and report suspicious activities that they encounter in the media, social media or in their mundane daily interactions with each other. Authorities will then be able to follow up on such reports, and substantiate cases against traitors to be tried by courts. The legal profession of course will have ample opportunity to assist along the way with perfecting the legal framework and the applicable constitutional language.

And so at best, the hunt for the secret plot of a constitutional coup becomes a mundane daily activity that brings members of the political community together, if for the purpose on reporting on one's peers for thoughtcrimes. At its worst, may be treated as an invitation to weave conspiracy theories with the help of law enforcement and the legal profession, assisted by the augmented reality tools supplied by social and state-controlled legacy media. Either way, the active search for a secret plot distorts the lenses through which proposals for constitutional change – including election platforms – are read, discussed and debated.

The search for traitors may turn into civic mobilization, but it is most certainly not a form of participatory politics in a constitutional democracy. Nonetheless, coup-mongering suggests that senior Hungarian judges are not only eager to defend illiberal constitutional democracy – they are ready to foster it in innovative ways.

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