The Crisis of Democracy in Hungary and Romania - Learning from Weimar?

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Hungary's political development under the Orbán government is by now a familiar topic. In April Barroso confirmed the European Commission's concern that Hungary's new constitution infringe EU legislation and the rule of law. Indeed, some commentators speak of 'the corrosion of constitutional democracy' or even a possible dictatorship in the EU. Romania is another problematic case. Its slide towards authoritarianism has not been (yet) enshrined in a new constitution. But its 2012 political crisis has seen by some as a coup d'état, during which Ponta's government aimed at removing all checks and balances on its power to impeach President Băsescu.

These developments raise fundamental questions. What is the future of democracy in the EU? Can authoritarianism be kept at bay, especially during crises? Who is the true sovereign and by what right? Who is the guardian of the constitution? What is the role of a constitutional court (CC)? These questions recall the Weimar crisis in the 1930s. Ellen Kennedy writes: 'in the new democracies of Eastern Europe ... the major fault lines of Weimar liberalism have reappeared: emergency powers, the courts as "defenders of the constitution", mobilization of antiliberal politics, ethnic identity politics, illiberal culture, and contested legitimacy'.

David Dyzenhaus's *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1999) analysed the Weimar crisis with an eye to offering solutions to today's crisis of liberalism. Actually, we can speak of two crises: the crisis of Western pluralism, tolerating social groups whose anti-pluralistic world-views reject the dominant order, and the crisis of legitimacy new democracies face. His book touches more explicitly on the former crisis. But he encourages the application of his analysis to other regions. So, after conversations with Iulia Motoc, judge on the CC of Romania, we decided to organize the workshop "Legality and Legitimacy: From Weimar 1932 to Bucharest 2012?", looking at parallels between Weimar and Hungary/Romania. The interdisciplinary event, hosted by the Brussels campus of the University of Kent, was attended by legal and political theorists, philosophers, historians and EU officials, following Dyzenhaus's model of 'Integrative Jurisprudence' combining politics, morality and history. I will reflect on overall findings.

Eleanor Curran (Kent Law School) introduced the main philosophical issues by focusing on Hobbes's account of legality and legitimacy, discussed by Dyzenhaus in his chapter on Carl Schmitt. She argued that Schmitt and Dyzenhaus are too quick to view Hobbes's account of law as an uncompromising absolutism involving a positivist command theory. Hobbes isn't arguing that the sovereign has unrestricted powers and his subjects must obey unconditionally. His theory also contains elements of natural law reasoning: 'The Law of Nature, and the Civill law, contain each other, and are of equal extent' (*Leviathan*, ch. 26). This entails the sovereign's duty to make *moral* laws, discerned by reason.

The same goes for Hobbes's theory of rights: some rights are inalienable, e.g. the right of resistance to the sovereign or the right to seek protection elsewhere. The final arbiter of legitimacy is the individual, conscientious citizen. He is the guardian of the constitution. So Hobbes's theory is less a precursor of Schmitt's decisionism or Kelsen's positivism, and more akin to the social republicanism of Heller (Dyzenhaus's hero), whose ideal is near total political participation. I think it's obvious that most democracies fall short of this ideal, but especially those with recent totalitarian

histories, like Romania and Hungary. My colleague at Nottingham, Cosmin S. Cercel, advocated more attention to these histories, and especially to conceptions of legality in anti-democratic ideologies. It is too often forgotten that Eastern Europe has a recent totalitarian experience – Communism.

The discussion then turned to Dyzenhaus's main topic, the Weimar crisis and Schmitt's and Kelsen's responses to it. In July 1932 Chancellor von Papen organised a coup d'état against Prussia (*Preußenschlag*) on the basis of emergency powers granted to the Reich's President by Art. 48 of Weimar's constitution. This abolished the autonomy of Prussia, a stronghold of republicanism, and prepared the path for Hitler. As Harm Schepel (BSIS) suggested, the problem was not Weimar's constitution, which was among the most progressive of its time, but its adoption by a country with a deficient understanding of liberalism. Similarly, East European political systems today have good constitutions, but make bad use of them.

Prussia appealed to the Reichsgericht, claiming that the emergency decree was unconstitutional. The Court dismissed the Reich's claim that the Prussian government was neglecting its duties, but endorsed the subjugation of Prussia, since the Reich was on the verge of civil war. Following Dyzenhaus, I noted that Carl Schmitt's position on *Prussia vs. Reich* was faulty. Prussia had protested to the Court that the President had violated his impartiality, intervening on behalf of an alliance between von Papen and the Nazis. Schmitt argued that von Papen had full legitimacy, since his mandate was given by the President, the guardian of the constitution. I argued that this was a sophism: neither von Papen nor Hindenburg had been independent of party politics. Schmitt's worry that a government with a parliamentary mandate is part of the problem, since it stands under the control of party politics, was hypocritical. Schmitt would deny that the Nazis were an ordinary party, since they had the support of the *Volk*, the true sovereign. Not true: the Communist party had strong support too.

Schmitt generally believed that liberalism is unable to draw the friend-enemy distinction without contradiction, because it grants equal rights to power to its opponent. Hence, pluralism is less preferable than a homogeneous society, in which the internal enemy has been eradicated. As workshop participants pointed out, this rejection of negotiation and compromise is reminiscent of the sharp polarisation of the political landscape in Hungary and Romania. Orbán's tendency to blame all criticism on inner and outer enemies is one example. Also, Schmitt's argument does not work against value-based conceptions of liberalism. Today's German constitution exemplifies a 'fortified democracy', whose immutable core of values (fdGO) can't be changed even by majority vote. Anybody acting or intending to act against it will be a prosecutable enemy of the constitution. It seems to me that like Schmitt the new authoritarians of Eastern Europe confuse legitimate political opponents with enemies of the nation or people.

Schmitt also denied that the Reichsgericht had jurisdiction over the constitutional problems involved in *Prussia vs. Reich*. The Court, in his view, guarded the constitution only in legal matters, but the deposition of the Prussian government had been a political issue, and here the guardian of the constitution was the President. Schmitt favoured the primacy of the political over law; genuine political power shouldn't be constrained by legal statutes. 'Sovereign is he who decides on the state of the exception' (*Political Theology*, 1922). This is ambiguous, as Dyzenhaus shows. It can mean 'Whoever factually decides, by sheer force, is the sovereign', but also 'Whoever is invested with the power to decide, is the sovereign'. The latter reading allows for political power to be constrained by a CC, as envisaged by Kelsen in "Wesen und Entwicklung der Staatsgerichtsbarkeit" (1929). Schmitt's rejection of constitutional review is unfounded.

Workshop participants pointed out that the political classes of both Romania and Hungary are inclined to a more 'Schmittian' than 'Kelsean' view of the relation between politics and law, as visible from the attacks both CCs suffered in recent years. Orbán's curtailing of the powers of the Hungarian Court are well known. The powers of the Romanian Court were curtailed by the Ponta government during the 2012 crisis, and individual judges, such as Aspazia Cojocaru

and Iulia Motoc, were threatened with dismissal, attacked in USL-friendly media and even had their lives threatened. As Motoc later explained, such attacks against constitutional judges are without precedent in Europe. They did not occur even in Weimar.

Cristina Arion (European Parliament) explained that the Romanian CC tried to assume its function as the guardian of the constitution as best as it could, defending its own powers to rule on the constitutionality of decisions adopted by the Parliament. Being placed under tremendous pressure, however, the Court was polarized and its decisions ultimately lacked coherence. For instance, the Court upheld the removal from office of the speakers of both houses of the Parliament, despite procedural irregularities, and refused to take a stance on the constitutional conflict between Parliament and President. Arion also pointed out that it should give cause for concern that Ponta's government attempted to reach its goals mainly by emergency decree, especially in the light of the Weimar crisis.

Several points emerged repeatedly during the discussion. One concerned the role the EU ought to take towards the erosion of constitutionalism in Eastern Europe. The consensus was that the EU does not only have the right, but the duty to intervene against nefarious political developments. In the 20th century, Europe witnessed two world wars, the worst genocide in history and was wrecked by two totalitarian ideologies. The EU was created with these events in mind, and it is therefore the guardian of European democracy and stability. It needs to understand itself as a 'fortified democracy'. Whether new institutions need to be invented, is an open question. Since Hungary and Romania are recipients of EU funds, the EU can exercise financial pressure. Such countries also care about their external image, so 'soft power' is another a tool. At the time of its accession Romania (and Bulgaria) was subjected to the CVM, a further mechanism instrumental in safeguarding the rule of law. I think it is fair to conclude, with Israel Butler, that governments 'with serious rule of law problems are unlikely to respond to quiet diplomacy or even naming and shaming, unless this is supported by the threat of sanction.'

Another debated point was the crisis of legitimacy the EU itself faces. Here opinions were divided. Some participants, like Sebastian Payne (Kent Law School), argued that the EU may be doomed to fail, because it was founded on the basis of unrealistic economic expectations. Others were more optimistic. There are remarkable similarities between Weimar's failure and the current crisis. But there are dissimilarities as well, which give rise to hope. Unlike the situation in the interwar period, *pace* Carl Schmitt's martial cravings and Orbán's rejection of institutionalists as 'lazy', we don't have a culture of war and decisionism, but of peace, negotiation and legalism in Europe today. This makes the spectre of a (military) dictatorship unlikely, I believe. Ultimately, the difference between Weimar and today's Europe is Weimar's own failure. We know today all too well what might happen if constitutional democracy fails. The Damoclean sword of history urges us to save the European project.

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