

The Crisis of Democracy in Hungary and Romania – Learning from Weimar? Some Lessons from an Interdisciplinary Workshop in Brussels

Hungary's worrying political development under the Orbán government is by now a familiar topic in the news and on this [blog](#). The new constitution, which came into force in 2012, and the more recent Fourth Amendment (March 2013), undermining the system of checks and balances, and especially the role of constitutional review, have received harsh criticism abroad, and especially from the EU. Recently the EU Parliament debated the constitutional situation in Hungary and while Art. 7 TEU (possible suspension of a member state) was not invoked, Barroso confirmed the European Commission's concern that Hungary's constitution may not be compatible with EU legislation and the rule of law. Some commentators feel that we should be less diplomatic. We can speak, with [Marco Dani](#), of 'the corrosion of constitutional democracy' or indeed, with [Jan-Werner Müller](#), of the possible rise of a dictatorship inside the EU. Romania is another problematic and in some respects, even more worrisome case. While its slide towards authoritarianism has not been yet enshrined in a new constitution (announced to be promulgated later this year), it faced in the summer of 2012 a political crisis during which the attempt by Victor Ponta's centre-left government to impeach President Basescu was at the limit of constitutionality, was described by [some](#) commentators as a coup d'état, and involved the intimidation and the curtailing of the powers of the Constitutional Court.

These developments raise some fundamental questions. What is the future of democracy in the EU? Can authoritarianism be kept at bay, especially during states of crisis and emergency? Who is the true sovereign and by what right? Who is the guardian of the constitution in a democracy? What is the role of a constitutional court? Many of these questions were raised during the crisis of the Weimar Republic in the 1920s and early 1930s. A comparative analysis is called for, given that, as Ellen Kennedy puts it, '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'¹. An important analysis of Weimar's constitutional crisis was offered by David Dyzenhaus, in his book *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1999), with an eye to offering possible solutions to today's crisis of liberalism, and more generally to the establishment of a stable and legitimate social order.² For Dyzenhaus this crisis comes in two versions: first, as the crisis of Western pluralism, which allows the emergence of social groups whose anti-pluralistic worldviews make them feel oppressed by the dominant order, and second, as the crisis of legitimacy nations face which are new to the game of democracy. While his book touches more explicitly on the problems of and debates about Western pluralism, he encourages the application of his analysis to other regions³.

Dyzenhaus' suggestion was followed up in the recent [workshop](#) "Legality and Legitimacy: From Weimar 1932 to Bucharest 2012?", organized by the University of Kent in Brussels, the University of Bucharest and the European Inter-University Centre, Venice. The event was attended by legal and political theorists, philosophers, historians and EU officials, and was therefore highly interdisciplinary, in line with Dyzenhaus' model of 'Integrative Jurisprudence', an approach to political and legal philosophy

¹ Kennedy 2004:4f.

² See also Dyzenhaus 1997 for a synopsis.

³ See Dyzenhaus 1999:16.

which combines politics, morality and history.⁴ There was a morning and an afternoon session, the first devoted to theoretical problems and the Weimar crisis, the second to recent developments in Hungary and Romania. The following summary will reflect overall findings.

The main philosophical issues were introduced by focusing on Hobbes's classical account of legality and legitimacy, also discussed by Dyzenhaus, especially in his chapter on Carl Schmitt. Eleanor Curran (Kent Law School) pointed out that Dyzenhaus, and especially Schmitt, are too quick in attributing to Hobbes an uncompromising political absolutism combined with a positivist command theory of law, according to which there are no restrictions on the law-giving powers of the sovereign and no protections for subjects, who are committed to unconditional obedience. Hobbes's legal theory is more ambiguous and contains elements of natural law reasoning as well, for he writes in the *Leviathan* (chp. 26): 'The Law of Nature, and the Civill law, contain each other, and are of equal extent'. This entails the sovereign's duty to make *moral* laws, found out by reason. This is also true of Hobbes's theory of rights: some rights, he argues, are inalienable, for instance the right of resistance against the sovereign, the right to rebellion or the right to seek protection elsewhere. The final arbiter of legitimacy is therefore the individual, conscientious citizen. He is the guardian of the constitution. This makes Hobbes's theory less of a paradigm for Schmitt's decisionism or Kelsen's positivism, and more akin to Heller's ideal of social republicanism, with its demand for near total political participation. As was stressed in the discussion, most EU countries fall short of this ideal, but especially countries with relatively recent totalitarian histories. Cosmin S. Cercel (University of Nottingham) stressed the need to critically analyse conceptions of legality in the context of anti-democratic ideologies, and their links to the present, especially in Eastern Europe.

The discussion then turned to Dyzenhaus' main topic, the Weimar crisis of 1932 and Schmitt's, Kelsen's and Heller's responses to it. In July 1932 the Reich, led by Chancellor von Papen, organised a coup d'état against Prussia (*Preußenschlag*) on the basis of the emergency powers granted to the Reich's President (Hindenburg) by the notorious Article 48 of the Weimar constitution. Since this abolished the autonomy of Prussia, for a long time a stronghold of Social Democracy and the defenders of the Republic, the event was hailed by Hitler and prepared the path for his takeover. As Harm Schepel (Brussels School of International Studies) suggested, however, the problem was not simply Weimar's constitution, which was among the most progressive ones of its time, but the fact that it was adopted by a country with a deficient understanding of liberalism. This is an important parallel to the political systems in Eastern Europe today, which may have good constitutions on paper, but demonstrate bad practice in observing them.

The discussion also addressed the verdict of the Reich Constitutional Court (*Reichsgerichtshof*) in the *Prussia vs. Reich* case (Prussia had appealed to the Court on grounds that the emergency decree had been unconstitutional), and especially Schmitt's and Kelsen's comments on the matter. The Court dismissed the Reich's claim that the Prussian government was not fulfilling its duties, but ruled that the Reich was correct to take control of Prussia, since the Reich was on the verge of civil war. Following Dyzenhaus, Edward Kanterian (Kent Philosophy Department) pointed out that Carl Schmitt's position on *Prussia vs. Reich* suffered from serious weaknesses. Prussia had

⁴ See Dyzenhaus 1999:xi.

protested to the Court that the President had actually violated his impartiality, intervening on behalf of an alliance between the Reich government (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. This was a sophism on Schmitt's part, since neither von Papen nor Hindenburg had been independent of party politics, and contradicted Schmitt's apparent worry that a government enjoying a parliamentary mandate is part of the problem, since it stands under the control of party politics.⁵ Schmitt would have denied that the Nazis were an ordinary party, since they had the support of the German *Volk*, the true sovereign. But the Communist party had a strong following as well.

Schmitt also argued that liberalism is unable to draw the friend-enemy distinction without contradiction, because the opponent is granted equal rights to power. Pluralism is to be replaced with a homogenous society, in which the internal enemy has been eradicated. As workshop participants pointed out, this rejection of negotiation and compromise is strongly reminiscent of the sharp polarisation of the political landscape in Hungary and Romania, and of the Orbán government's tendency to blame all criticism on inner and outer enemies. It was also noted that Schmitt's criticism does not work against value-based conceptions of liberalism, such as they are manifest, for instance, in today's German constitution, which exemplifies a 'fortified democracy' (*wehrhafte Demokratie*). Here an immutable core of values (*freiheitliche demokratische Grundordnung*) is agreed upon from the outset and can't be changed even by majority vote. Anybody acting or intending to act against it will be a prosecutable enemy of the constitution (*Verfassungsfeind*). Like Schmitt, the new authoritarians of Eastern Europe confuse legitimate political opponents with enemies of the nation or people.

Insofar as the Reich Constitutional Court had jurisdiction over the constitutional problems involved in *Prussia vs. Reich*, its verdict was itself constitutional and binding, as was argued by Kelsen in 1932.⁶ But Schmitt rejected the very legitimacy of the judicial review of the case. The Court, in his view, guards the constitution only in legal matters, but the deposition of the Prussian government had been a political issue, and the guardian of the constitution with respect to political issues was the President.⁷ This was in line with Schmitt's idea of the primacy of the political over law, and his inclination to deny that genuine political power can be constrained by legal statutes. For, as he had argued in *Political Theology* (1922), 'Sovereign is he who decides on the state of the exception'. But this is ambiguous, as pointed out by Dyzenhaus.⁸ 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'. On the latter reading constraint on political power through a constitutional court, especially in a negative way, is perfectly conceivable, as indeed envisaged by Kelsen.⁹ Workshop participants pointed out that the political classes of both Romania and Hungary are inclined to a more 'Schmittian' than 'Kelsenian' view of the relation between politics and law, as has been visible from the numerous attacks both Constitutional Courts suffered in recent years from politics and media. Orbán's curtailing of the powers of the Hungarian Court was mentioned above. 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, assumed

⁵ See Dyzenhaus 1997:125.

⁶ See Kelsen 1932.

⁷ See Dyzenhaus 1997:126.

⁸ Dyzenhaus 1999:43ff.

⁹ See Kelsen 1929.

to be unwilling to follow the goals of the Ponta government, were threatened with (unconstitutional) dismissal, were attacked in the media and even had their lives [threatened](#).

As Cristina Arion (European Parliament) stressed, the Romanian Constitutional Court 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.¹⁰ 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 existence of a constitutional conflict between Parliament and President. The Court thus missed a crucial opportunity to evaluate the crisis as a whole. As Arion explained, what was so troubling in the 2012 crisis was the fact that the Ponta government aimed at effectively removing all checks and balances on the exercise of its power in order to remove the President from office and control all state institutions. In the light of the Weimar crisis, the fact that this was done mainly by emergency decree should also give cause for concern.

Several points emerged repeatedly during the discussion. One concerned the role the EU has taken and ought to take towards the erosion of constitutionalism in Eastern Europe. Here the majority of opinions considered 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, Communism and Nazism. The EU was created with these events in mind, and it is therefore the guardian of European democracy and stability. Hence, it needs to understand itself, as recently argued by [Jan-Werner Müller](#), as a 'fortified democracy'. Whether new institutions need to be invented to this end, is an [open question](#). The EU does not have only the 'nuclear option' of Art. 7, but the more mundane, if potentially efficient tool of financial pressure, given that countries like Hungary and Romania are recipients of EU funds. Such countries also care much about their external image. The Romanian 2012 crisis was partly abated because it triggered so much international criticism and explicit threats from the EU, the Venice Commission etc. The 'soft power' of the EU was effective enough and Victor Ponta's government reluctantly accepted to commit to respecting the independence of the judiciary, even if the then *ad interim* President Crin Antonescu protested, claiming that 'Romania is not a colony of the EU'. One should recall, however, that at the time of its accession to the EU, Romania was subjected, together with Bulgaria, to a Cooperation and Verification Mechanism that monitors their progress in the sphere of the rule of law. The existence of this mechanism, as well as Romania's ongoing efforts to join the Schengen area were, according to Cristina Arion, instrumental in safeguarding the rule of law in this country. This also shows, as argued by [Israel Butler](#), that EU action to safeguard rule of law in its Member States can be effective only if backed by some form of sanction.

Another debated point was the crisis of legitimacy the EU itself faces. Here opinions were divided. Some, 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 disagreed on this point. The similarities between Weimar's failure and the current crisis are not to be neglected. But there are dissimilarities as well, which

¹⁰ For more criticism against the Court, see <http://www.icconnectblog.com/2012/12/the-illusion-of-the-romanian-constitution/>.

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, which makes the spectre of a (military) dictatorship unlikely. Ultimately, the difference between Weimar and today's Europe is Weimar's own failure. We know today all too clearly what might happen if constitutional democracy fails. History provides us here with a Damoclean sword that urges us to save the European project.

Edward Kanterian¹¹

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