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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

in co-operation with  
**THE CONSTITUTIONAL COURT OF GEORGIA**



**REPORT**

**“CONSTITUTIONAL CRISIS AND EROSION  
OF RULE OF LAW THREATEN HUMAN RIGHTS PROTECTION”**

by  
**Ms Herdís KJERULF THORGEIRSDÓTTIR**  
**(Member, Iceland)**

Mr President,  
Ladies and Gentlemen,

The Venice Commission as I mentioned in my opening speech this morning came into being after the fall of the Berlin Wall 26 years ago. This was perhaps the most optimistic moment in Europe's post-war era.

The period since has been characterized among other things by the on-going effort to achieve constitutional justice based on three essential characteristics of modern constitutionalism: limiting the powers of government, adherence to the rule of law, and protection of fundamental rights.

These noble objectives have been and are still met with various hindrances, not only deriving from the previous political cultural but also due to the current problems inherent in globalization. Europe today is beset with crisis as I will refer to later.

Looking back to the early 1990s radical changes occurred in the former communist regimes in Eastern Europe and the former USSR going from totalitarianism or authoritarianism to democracy and from central planning to a market economy.

The political and social reform which was expected to follow in the wake of the new regimes emerging from the 1980s revolutions in Eastern Europe required redistribution of power to ensure its success;<sup>1</sup> a system of separation of powers, a key component of checks and balances in a constitutional democracy, as the VC has emphasized.<sup>2</sup>

The rule of law was to cement the transition from the previous regimes as the cornerstone of contemporary constitutional democracy.<sup>3</sup>

Human rights were to be considered a natural component of constitutional law. András Sajó, now Vice President of the ECtHR points out in his book on the post-Communist application of "western rights" that immediately after the collapse of the communist regimes, important legal steps were taken to protect human rights – although the rights culture was both unstable and superficial.<sup>4</sup>

Constitutional courts emerged in Eastern Europe during this period of democratization and have become important actors in the internalization of international and European principles of human rights in their respective legal orders.<sup>5</sup> These courts constitute the cornerstone of constitutional democracy with the task of identifying and removing unconstitutional provisions from the body of legislation as I mentioned earlier on.<sup>6</sup>

They are the main guarantors of the Constitution, the necessary ground for the existence of the rule of law.

The rule of law may mean different things to various legal traditions but in the context of modern constitutionalism with protection of fundamental rights the rule of law sides with the

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<sup>1</sup> See Joseph Raz, *Western Rights? Post Communist Application*; ed. András Sajó, Kluwer Law International (1996), p. Xviii.

<sup>2</sup> CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013, par. 76.

<sup>3</sup> Michael Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, in *Southern California Law Review*, Vol. 74 (2001).

<sup>4</sup> Sajó, p.157.

<sup>5</sup> <http://www.ejls.eu/2/28UK.htm>

<sup>6</sup> CDL-AD(2012)001, para. 90. 54 CDL-AD(2013)001, para. 92. CDL-AD(2013)012 - 18

citizens to the extent that constitutional law can be invoked by citizens against laws and policies of the state. Constitutional justice means as the VC has pointed out that “[e]veryone should be able to challenge governmental actions and decisions adverse to their rights or interests. [Preventions] of such challenges violate the rule of law.”

Courts are part of the establishment, which is no historical accident, as it is necessary for them to have the authority they require for their proper functioning.<sup>7</sup> As the VC has pointed out in place of the supreme role of the legislative assembly being under the complete control of the Communist Party a new system of separation of powers based on the principle of checks and balances between different state organs was introduced. As a consequence, even Parliament has to respect the supremacy of the Constitution and it can be controlled by other organs, especially by the Constitutional Court.<sup>89</sup>

Courts cannot function unless the government is willing to obey their orders. In discussing judicial independence an East European scholar wrote in the 1930’s that judges should not have to “fear or flatter anybody”.<sup>10</sup> Yet, judges for many decades served the regime and their work was controlled by the authority.<sup>11</sup> These judges were accustomed to applying the law without raising constitutional objections<sup>12</sup> and hence it should not be surprising that it may take time to change such mentality.

Of course it may be argued that judicial independence rests with the personality of a judge – like Ronald Dworkin’s metaphor of judge Hercules, an idealized construct that if such a figure existed, he/she would arrive at a right answer in every dilemma.

It is, however, not realistic. The VC recently warned against the danger where a ruling majority can appoint to practically all state institutions officials favourable to its political views.<sup>13</sup> The VC emphasized in this respect that constitutional judges have a “duty of ingratitude” towards the authority that elected or appointed them. As judges, they are independent, their loyalty is to the Constitution, not to those who have elected/appointed them.

We are currently witnessing constitutional crisis where authorities are pushing through laws that are regarded as weakening constitutional checks and balances and media freedom; and/or where the constitutional courts or their judges<sup>14</sup> appear to be under pressure to rule in favour of authorities – a risk to their judicial independence with serious consequences for the public interest in protecting human rights.

In March 2016, the Venice Commission prepared a declaration on “Undue interference in the work of Constitutional Courts in its member States” after the situation of Constitutional Courts in several member States became critical:

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<sup>7</sup> See Joseph Raz.

<sup>8</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)

<sup>9</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)

<sup>10</sup> E. Waskowski, As quoted in *From Old Times to New Europe, the Polish Struggle for Democracy and Constitutionalism* by Agata Fijalkowski, Routledge 2010.

<sup>11</sup> Agata Fijalkowski, *supra*, p. 3.

<sup>12</sup> See Mark Brzezinski, “Constitutional limits within limits” in *East European Constitutional Review*, 2 (1993), pp. 38–43.

<sup>13</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)

<sup>14</sup> <http://ajaratv.ge/news/en/3337/giorgi-papuashvili%E2%80%99s-scandal.htm>: Chairman of Constitutional Court (Georgia) made a statement about pressure on judges yesterday. According to him, the pressure is being exerted, mainly, on the judges that are reviewing cases of high public interest. “Recently pressure has been exerted on certain judges, which is reflected in their secret surveillance, deliberate harassment of them and their family members’ commercial activities, blackmailing and detention of their relatives for various charges; in addition, information about their private life, that are fake, may be made publicly available”, - said G. Papuashvili, Chairman of Constitutional Court expressed readiness for talking about the issue with high officials.

- notably in Poland, where the new Parliamentary majority that came to power in October 2015 was undertaking a number of changes in key areas at an extremely rapid pace, without allowing for meaningful political discussion with opposition parties;
- in Turkey where the President had declared that he would not respect a recent judgment of the Constitutional Court of Turkey and moreover threatened to abolish the Court -
- Georgia was also mentioned because there were public calls from the Minister of Justice to end the President of the Constitutional Court's mandate, which would undermine the authority of that Court.<sup>15</sup>

The VC has warned strongly against crippling the effectiveness of Constitutional Courts as their function is a precondition for the legitimacy of State action in a democracy.<sup>16</sup> Where courts cannot go - legal rights amount to little.

The prospects of constitutionalism in the post-Communist countries is still a worthy question a quarter of a century after the collapse of the old regime. Europe today is beset by various threats and challenges; terrorism, the largest migration of people since WWII, sovereign debt, unemployment, growing inequality, political corruption, the rise of nationalistic movements and parties with the objective of withdrawing from European regional integration; as well as the rise of more authoritarian governments, demagogues and growing civil unrest with unforeseen consequences.

A key to understanding any society is its informal institutions, which influence both its economy and its politics. It is a widely acknowledged problem that many countries aspiring to be free market economies have evolved into state-dominated oligarchies where corruption stands in the way of key reforms and separation of power is still very vague.

In constitutional law the focus is on the relationship of different entities within a state, namely the executive, legislature and the judiciary and the substance and scope of the rights of citizens *vis-à-vis* the state. Perhaps we need to re-evaluate our understanding of constitutional law and constitutional rights according to the paradigm of legal pluralism taking into account the current reality of influential actors outside the elected authorities providing new obstacles on the road to constitutional justice and protection of human rights.<sup>17</sup> Civil and political rights need not only be protected from the elected authorities but also those with tremendous financial power distorting democratic processes whether like elections or and buying influence in the so-called fourth estate – the media.

I will take an example from the United States of America once heralded as the greatest democracy in the world. A highly criticized decision, so-called Citizens United judgment by the United States Supreme Court in 2010 dealt with the regulation of campaign spending organizations – opening the floodgates for special interests—including foreign corporations<sup>18</sup>—to spend without limit in US elections where a tiny group now wield great power. The most troubling result of Citizens United judgment in a time of historic wealth inequality, the decision has helped reinforce the growing sense that democracy primarily serves the interests of the wealthy few, and that democratic participation for the vast majority

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<sup>15</sup> <http://www.venice.coe.int/webforms/events/?id=2193>

<sup>16</sup> Opinion on the Two Draft Laws amending Law No. 47/1992 on the Organisation and Functioning of the Constitutional Court of Romania, CDL-AD(2006)006, para. 7; Amicus Curiae Opinion on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania, CDL-AD(2009)044, para. 143.

<sup>17</sup> See for example, Gavin W. Anderson, *Constitutional Rights after Globalization*, Oxford and Portland Oregon (2005).

<sup>18</sup> See Ronald Dworkin discussion f.ex. <http://www.nybooks.com/articles/2010/05/13/decisionthreatens-democracy/>

of citizens is of relatively little value. US Supreme Court Justice Ruth Bader Ginsburg has publicly declared that if she could overturn one decision over the past several years, Citizens United would be it – stating that “our system is being polluted by money”.<sup>19</sup>

A year after the Council of Europe was established in 1949, Winston Churchill spoke of the Soviet regime as “a tyranny far worse than that of the Czars”<sup>20</sup> – the CoE is based on the pillars of democracy, human rights and rule of law – and these pillars when working together form a safeguard against any kind of tyranny – because tyranny has many faces and usually manages to appear in new forms yet is always based on the closing down of public debate and criticism; erosion of the rule of law and high inequality as is the situation widely today.

*Thank you very much for your attention.*

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<sup>19</sup> Supreme court justice Ruth Bader Ginsburg speaking at Georgetown University Law Center’s graduating class in February 2015; <https://www.theguardian.com/law/2015/feb/04/ruth-bader-ginsburg-supreme-court-citizens-united>

<sup>20</sup> Address given by Winston Churchill to the Council of Europe (Strasbourg, 11 August 1950). [http://www.cvce.eu/content/publication/1997/10/13/ed9e513b-af3b-47a0-b03c-8335a7aa237d/publishable\\_en.pdf](http://www.cvce.eu/content/publication/1997/10/13/ed9e513b-af3b-47a0-b03c-8335a7aa237d/publishable_en.pdf)