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Challenges to Constitutionalism: The Role of Constitutional Courts

REPORT BY

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After 1945, and after 1989, there was a feeling that it had been done. The Declaration of Human Rights and the transition to democratic constitutionalism after the end of the cold war, with the fall of the wall that divided Germany, and separated West from East, are hallmarks of a victory of the belief in fundamental rights, democracy, and the rule of law. In fact, it was more than just belief. In the 20th century, we have seen the development of working democratic states, with courts that deserve that name. From a German perspective, one may see the history of the Federal Constitutional Court as paradigmatic: Rising from the horrors of Nazi Germany, judges who had been victims of discrimination themselves gradually restored trust in the law, a law which safeguards democracy, as the core element of constitutionalism. In your countries and contexts, you may look at your courts, or at your post-authoritarian constitution, or at a civil society that took it in its own hands to insist on constitutional democracy, and you may then want to tell that same story: that fundamental rights, democracy, and the rule of law have won.

Yet today, one may hesitate. Shall we still tell the story that way? Is it well founded, enough evidence around? I wonder. In fact, there is reason to worry. Democracy, fundamental rights, and the rule of law, in short: constitutionalism, is under attack. Since these attacks are strong and dangerous, it is not the time for cautious warnings. Quite to the contrary, it is time to act, because there is more than just pressure these days. In some places, constitutionalism does already crumble, and needs to be rebuilt. It is particularly worrisome that this happens in states which earned it to be seen as hallmarks of the victory of democracy, fundamental rights, and the rule of law, thus: constitutionalism. It is also scary how fast this happens. In addition, it is extremely worrying that pressures build in many more contexts, and in many more or less subtle ways.

Attacks on Constitutionalism and Courts

The countries in which constitutionalism has crumbled recently are rather well known. Notably, the people protested attacks on constitutional courts in rallies, as in Poland, and media has been reporting, although media attention is hard to attain or vanishes when attacks on onstitutionalism appear to be rather formalistic modifications, as in changes of rules of procedure. However, the Venice Commission has reacted to worries with reports that detail the deterioation of the rule of law.

Also, attacks on courts are coupled with attempts to abuse the term democracy. It has been featured as a description of “illiberal” regimes, which is in fact a contraction in terms. Democracy without the protection of fundamental rights to ensure freedom of speech and the press as well as non-discrimination, for a start, does not deserve the name. In times in which the story being told and the term being used, become more important than things that happen, we need to prevent the term from being stolen. Similarly, there is decorative “constitutionalism”, which, in fact, is not one. Instead, leaders accept the decorum of a constitution, and even a court, yet there is no true checks and balances, no rule of law, and thus no constitutional democracy in place. Also, there are key actors in many societies still featured as bound by the rule of law, who nonetheless “bend” the law, thus, in fact, break it. Attempts to defend this as economic or social or cultural necessity should be rejected clearly and swiftly. There is no justification for ignoring rules agreed upon to save a currency or market, or to block the entry of refugees, or to save a nation, or a culture, or an identity. We need to make sure that this is not called a “flexible” use of law or anything of the kind, but named as an abuse of the power at hand. No one should get away with it, nowhere. So, when there is a person in office that snaps at “so-called judges” who did their job, or when there are tabloids that call justices “enemies of the people” to pressure a court into not doing what constitutional courts have been designed to do: stop government, and if needed, even stop majorities before they crush others, we need to stand up against that. In the past,

international courts have been attacked fiercely, as the ECHR or the International Criminal Court. They are particularly vulnerable and face too much resistance too often. There has already been a need to clearly counter those attacks. When national courts are under pressure, the need feels more imminent, yet it is the same. And it affects all of us. In Germany, although the Federal Constitutional Court of Germany enjoys an extremely high level of trust by the people, we do also hear words that worry us, and we depend upon people who speak up against that. Yet these days, attacks on constitutional courts, and on constitutionalism, are nowhere unknown.

Attacks and Critique

What we see when we get such news or hear such talk or face such acts are, again, attacks on fundamentals. It is not simply critique, and there is a need to carefully distinguish between the two. A critique of a decision and a critique of the reasoning of a particular ruling or of an argument used, thus a critical reaction to a particular act particularly of those courts that safeguard democratic politics and protect fundamental rights, is needed. Critical reconsiderations are an integral part of constitutionalism. In particular, constitutional courts themselves need to face criticism because of the structural task they have. Criticism often boils down to result oriented reminders of what we should or should not do. This is important. In addition, there is criticism directed against the arguments courts use, and the reach of decisions, which indicates the power courts employ. And in fact, it is crucial to carefully listen to that. So courts need critics, and should listen carefully to them. But courts shall not be attacked, or bow to pressure. So it is well known that there are issues and times when more people are more critical of what courts do than on other issues and at other times. These days, such issues are fundamental rights and terrorism, xenophobia and racism, religious diversity and tension, and the troubling state of emergency rule. Again, critical reconsiderations are needed, also in reactions to court rulings. But attacks are inappropriate, particularly when constitutional courts deliver what they are meant to do.

As such, critics may pose challenges. However, this it is not the same as attacks on the basics. The talk and acts that need to worry us today are not just critical. Rather, they are attacks on the foundation of constitutionalism, with the intent to do away with courts that deserve the name. This happens when people, or governments, refuse to comply with rulings from the ECHR or reject the very idea of the ICC, which keeps happening. Then such fundamental rejection, which is different from critique, is not the problem of that one court alone. Rather, it is the problem of all who care for constitutionalism. When such courts are called into question as such, it is an attack on democracy, fundamental rights, and the rule of law, thus on the post 1945 and 1989 consensus. This is why we need to care. And eventually, this is why there is a necessity to act.

Careful Analysis - Details Matter

To counter attacks and defend constitutionalism, we need to understand the arguments and strategies employed, to take them apart. There is a need to not only enjoy democracy, fundamental rights, and the rule of law, but to prepare and be willing to defend it. Such defence will only be understood by the people, including decision makers but most importantly, on the long run, with the people as citizens, if we are clear on their meaning: democracy, fundamental rights, and the rule of law.

So what is it we care about, as constitutionalism? What does the Venice Commission stand for and should strive to enact day after day? What is it exactly that drives you in your work for constitutional and supreme courts?

Key elements are democracy, fundamental rights, and the rule of law. In short, this is called constitutionalism. And be assured: constitutionalism is not a nationalist nor a Western or exclusively European or a German or any other nation´s concept. Constitutionalism names the global understanding of the way to ensure that government works for the people, empowered by the people, with independent courts to ensure fair proceedings, from elections to forming a government and appointing judges to passing laws, and with an implemented guarantee of fundamental human rights, including dignity, liberty and equality, that even democratically elected majorities have to respect. As such, constitutionalism is based on institutions that do this job wisely. Without implementation, it becomes fake decorum.

To control government and possiblyeven stop majorities, constitutional courts are therefore important actors. In fact, they are indispensable. This is why meddling with access to such courts or with the appointment of judges to these courts or interfering with the way these courts work and decide, goes to the heart of the matter. It may be subtle to “only modify some formal rules”, yet it is, in fact, an attack on the very fundamentals of constitutionalism itself. It is not subtle at all to have judges removed from office. It is also an attack on courts to refuse to install those who are properly appointed, or to fill empty seats. Again, there are many more or less subtle versions of attacks on constitutionalism.

Reactions of Courts: Independence and Standing

As stated, there is a need that all of us react to such attacks, and defend democracy, and the rule of law. Yet more specifically, there is the complicated question of how courts should react, in rulings and beyond. Because they are targets, this may be particularly difficult. But because they are powerful actors to implement constitutionalism, it is also called for.

Regarding courts reacting to crises of constitutionalism, there may be two dimensions to consider: independence and standing. For courts that have a constitutional function, be it as a separate constitutional court or conseil, as in Austria, Germany, Poland, or more recently the UK, or as supreme court or tribunal, as in many other countries, both independence and standing matter. Obviously, these are interrelated, but point to different directions: Independence refers to institutional design, as the internal factors that shape a court, while standing refers to the institution´s activity directed at and recognised by the audience and by observers, as its external side.

Independence from Populism

To safeguard constitutionalism, particularly in times under pressure, a court needs to be sufficiently independent not only from politics, but also from popular sentiment and populism. This starts with the basics, such as power over resources, the budget, and in the history of courts, governments have often fiddled with that. However, independence also means power over procedural rules. Is this done by legislation, which, in fact, often means the government, or are internal procedures self-defined? By “only modifying procedure”, you can turn a court into a lame duck. So beware.

Other factors are more complicated. Independence may also mean the freedom whether to take a case (“freie Annahme”) or not. The German Federal Constitutional Court does not have this freedom, and it safeguarded us against the assumption that we make political choices. It forces us to decide more than 6000 cases a year, so it comes at a price. But the obligation to take every case also contributes to trust in a court as a legal, not a political institution.

Independence also means the freedom of priority, to decide on when to decide a case, and speed up urgent matters, and the freedom to publish and inform the press yourself. This has been taken for granted as a key factor of truly independent institutions. However, it has also been taken away from courts more recently. A dangerous event.

Necessarily, independence comes with people. Judges, or “Justices”, need to be protected against corruption, and against political pressure, and against a threat as to their life after office, and courts need to be protected against staffing with the incompetent. It matters who chooses and who can be chosen, and it matters that there are criteria and they are used. The Council of Europe has developed very good ideas on the issue, including diversity on the bench.

Finally, it matters what you imagine to be “the justice”, or the judge. Is this the old white upper class male, or does the bench somewhat mirror society? Is a good justice a celebrity for life, or a person serving society for a time? How close should the judges be to politics? In Germany, some features of our institutional design and the image of a good judge are incentives for consensus. Here, Hercules is not the calling. And additional factors matter.

The Standing of Courts

Next to independence, standing matters to constitutionalism, and to courts. No power of the sword nor purse – so standing must be the source, the bone, and backup of what courts do. Then, what informs the standing of courts? What makes a court a good court, deserving our respect, support, and eventually, defence?

Again, institutional design matters. The obligation to hear all cases, yet to prioritise yourself seems to contribute to standing, as does access, types of proceedings, and options to decide. Again, when governments interfere on that level, and when types of cases are excluded from judicial review, one needs to worry.

In additon, standing is informed by political context. Traditionally, this has called for a focus on the separation of powers. Traditionally, we looked at presidents, parliament and government. However, and in light of the threats to constitutional courts around the world, we need to understand more than that. Political economy matters, as in how and what money drives politics. Social inequalities that shape a society matter, be they gendered, or racialised, or religious. In a patriarchal society, a court needs specific standing to defend equal rights in marriage equality, or family matters. In a racist context, a court needs particular courage to go against a populist call for excluding the other. And in religiously charged politics, a court needs a specific standing to rule against the normal majority. Thus, standing matters tremendously to take a decision that stops power, be it public or private, to protect constitutionalism, namely: fundamental rights, democracy, the rule of law.

Rulings under Pressure

When consitutionalism faces pressure, and even attacks, the courts entrusted with its defence need independence and standing to eventually go against the flow, particularly the flow of populism. These days, there is, thus, a necessity to explain in pulic what courts do. However, throughout the history of constitutionalism, there are also rulings that exemplify attempts to defend constitutionalism against attacks, and may point to the courage it takes. Some of the more recent case-law of the German Federal Constitutional Court may illustrate the challenges. All press releases to these cases are provided in English as well, and Senate decisions will eventually be translated and available at the court´s website. They address religious diversity, and the dangerous pressure to exclude “the other”, as well as

terrorism, and the danger to have “security” trump fundamental rights, in addition to the challenge of nation states embedded in larger legal orders and the dynamics of globalisation. Finally, the ruling on a request to prohibit a political party shows how a court deals with the political system directly, to defend democracy by protecting, under certain conditions, even its enemies.

Religious Diversity and Equal Rights

In a secular state, yet predominantly Christian country and culture, cases that call for the presence of religious minorities, are always challenging. In particular, this is the case when those new to the scene claim fundamental rights, as immigrants, and those come to the court who are framed as foreign, different, exotic, and strange, and those bring cases that are more or less closely associated with one ethnicity, and nationalities, and politics, like Muslims in Germany, just like Muslims in many European countries these days, and when all of this happens with populist racism and xenophobia on the rise. Particularly then, a court needs to be independent and enjoy sufficient standing to defend fundamental rights. So when right wing populists marched the streets of Karlsruhe every week, and schools reported violent clashes over religion, and the headscarf had become a symbol of the illusion of homogeneity, of “us versus them”, the German Federal Constitutional Court struck down a statute that privileged Christianity, and excluded women who covered their head for religious reasons from a teaching career (January 27, 2015)[1]. We needed, and still need, standing to do that. However, the Court also gained, again, the trust of the people tro go against the flow when needed.

This happened again, also in the context of challenges that come ith religios pluralism, and with critics from the other side, but nonetheless a clear stand for fundamental rights. There, the Court ruled on Good Friday (October 27, 2016)[2], one of the highest Christan holy days of the year, traditionally protected by law in Germany. However, tradition cannot trump individual rights. Thus, we held that the legislator, as the democratically elected majority, may well choose to declare religious days a holiday. Yet, it has to respect the rights of those who enjoy the day off, yet do not observe the religious calling. Therefore, the applicant was granted the right to organise a party, and drink alcohol, if that does not disproportionately interfere with those in silent prayer.

Terrorism and Liberties

Another line of jurisprudence that may illustrate the need for independence and standing for a constitutional court is the defence of fundamental rights in the efforts to prevent terror. This is a strong tradition of the German Federal Constitutional Court, and a clear hallmark of post 45 and post 89 constitutionalism, as a strong stance against categorising people on lists, against surveillance and the potential to abuse police and secret service information. However, a court that cares for standing shall also not be naïve. In a context in which terror does truly terrorise so many, one cannot stubbornly insist on doctrine, yet has to defend the basics and fine-tune, based on proportionality, what can be done. Therefore, in the ruling on the Federal Criminal Police Office (“BKA”; April 20, 2016)[3], we struck down parts of a statute that gave disproportionate powers to the police in collecting data, and did not sufficiently define the limits of transmitting data to other countries. The ruling says that even via data,

[1] BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10, English translation of the decision available at: http://www.bverfg.de/e/rs20150127_1bvr047110en.html (last accessed 19 June 2017).
[2] BVerfG, Order of the First Senate of 27 October 2016 – 1 BvR/458/10, Press Release in English available at: http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-087.html (last accessed 19 June 2017).
[3] BVerfG, Judgment of the First Senate of 20 April 2016, of 20 April 2016 – 1 BvR 966/09, English translation of the decision available at: http://www.bverfg.de/e/rs20160420_1bvr096609en.html (last accessed 19 June 2017).

the state shall not ever lend a hand to human rights abuses anywhere. With this, the ruling is also an example of our attempts to be part of the world, and not in national isolation.

Embedded Constitutionalism

Today´s reality of embedded constitutionalism, both in the region and its legal forms, like the EU and the Council of Europe, and in the world of the United Nations, as well as in close connection across the globe, is taken into account regularly these days. The German Federal Constitutional Court does interpret the national constitution in light of ratified international law, as interpreted by the competent courts. In addition, it more and more often deals with transnational matters. The Euro rulings are illustrations to the point. In addition, and somewhat mirroring the Federal Police Office case, the Court had to decide that U.S. secret service information, the NSA selector lists, may not be given to a parliamentary committee because the governments interest in non-disclosure outweighs the interest in parliament to control the issue (October 13, 2016)[4]. However, the Court made sure that this does not limit the work of parliament in external or security matters as such. Indeed, the German Federal Constitutional Court does emphasise, in many rulings on European integration as well as on social security issues and more, that it is parliament at the centre of our democracy, not government. Again, however, you see a court fine tuning constitutional control, to balance the interests at stake, and protect its standing.

Defensive Democracy

Finally, constitutional courts sometimes are confronted with the very broad political questions even more directly. In Germany, this was the case in the proceedings initiated by the State´s Chamber, the Bundesrat, to prohibit the NPD, a neo Nazi party, in Germany. As a defensive, or sometimes called “militant” constitution, there is a clause in the Basic Law that allows for such an exceptional case (Art. 21 of the Basic Law[5])[6]. However, this is not emergency rule or reasoning. Quite to the contrary. The quality of German constitutionalism, and of the Court watching over it, called for meticulous proceedings, with several days of hearing all sides, and the longest judgment ever given, with detailed discussions of all concerns raised in the context. Finetuning the option to prohibit a political party, the Court was clear to denounce that party´s politics, based on a concept of “people” that violates human dignity, and denies the fundamental equality of people, particularly targeting foreigners, migrants, religious and other minorities, and thus entirely inacceptable in a democratic society based on the protection of fundamental rights. Moreover, the Court explained that this party also disrespects the very basics of democracy, in callig for a specifically ethnic people to run the country. Such nationalist populism does not fly with a constitution that deserves the name. However, that party is not strong enough to really threaten our fabric. There is no prospect, to date, to achieve the aims sought. Thus, the Court denied the prohibition. The party is free to act. The judgment explains constitutionalism. It also takes a stand against those who are tempted to easily exclude its enemies. Or to paraphrase: When they do low, we go high.

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[4] BVerfG, Order of the Second Senate of 13 October 2016 – 2 BvE 2/15, Press Release in English available at: http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-084.html (last accessed 19 June 2017).

[5] Links to translations of the Basic Law and other legal sources are available at http://www.bundesverfassungsgericht.de/EN/Verfahren/Rechtsquellen/rechtsquellen_node.html (last accessed 19 June 2017).

[6] BVerfG, Judgment of Second Senate of 17 January 2017, – 2 BvB 1/13, Press Release in English available at: http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html (last accessed 19 June 2017).

The Courage to Act

In sum, this may demonstrate, as do many other courts with their rulings in this world, that independence and standing are, particularly in light of the worrying threats to constitutional courts, indispensable ingredients of constitutionalism. If constitutional courts deserve the name, they need to be independent, enjoy standing, and be courageous to defend what we stand for. The Venice Commission is a collective that supports this cause, as do all of you. There is a need to find the courage to act.