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Title: Democracy and rule of law: the Hungarian goulash

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Example citation: Ressel, J. (2013) Democracy and rule of law: the Hungarian goulash. *Law, Culture & Ideas Blog*. 23/06/2013

Version: Published version

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Democracy and rule of law: The Hungarian goulash.

Posted on [23/06/2013](#)



In middle of Budapest, on the bank of the Danube facing Buda, stands Hungary's Parliament.

It is a spectacular building, a stunning political 'cathedral' of a building designed to honour the gods of democracy and late 19th Century *Mittel-European* culture and identity rising from the ashes of crumbling empires.

The presently rather strained and difficult relations Hungary is experiencing with the European Union ('EU') follow significant constitutional changes introduced over the last two to three years which appear to effectively abolish the rule of law and democracy in Hungary. The episode also helps to illustrate the inherent weakness but also the strength of the dialectic in the idea of Europe, refreshing our appreciation of the ideas of rule of law, democracy and brute power politics.

The Council of Europe has described the changes as following "*an instrumental view of the constitution as a political means of the governmental majority*" [1]. Meaning that the power interests of the political party in government become overbearing, unrestrained by any substantive legality. The Constitution as a fundamental basic law, and seen as the effective legal guardian of rule of law and substantive legality is used as a mere instrument of political power suborned to the self-interest of one political party. Thereby, the political power sidesteps the necessarily limiting dialogic constitutional mechanisms and structures which operate to maintain a balance of fairness and legality between the political self interests of those in power and the interests of the powerless.

The delicate and fragile system of negotiations, compromises, checks and balances necessary for an effective rule of law is substantially disrupted, leaving us with nothing more than a chimeral and hollow echo of the rule of law encased in a legal formalist straight jacket in a hall of mirrors.

So we may ask what is the legal architecture underlying this problem.

By Article 2 of the Treaty on European Union ("TEU") [2] each member state affirms the founding values of the Union and legally agrees as a condition of membership of the Union, to "...*respect human dignity, democracy, equality, the rule of law...*"

Thus the basic 'European common values' are values of the rule of law and democracy underpinned by the respect for fundamental human rights and freedoms as enshrined in the Charter of Fundamental Rights of the European Union [3]. Further, it is argued, that the common values set out in Article 2 are the core rights of any European Union citizen, irrespective of nationality and political or cultural identity.

However, under the principle of the rule of law, core rights can only remain real and effective rights providing that the fundamental European common values and principles, signed up to by EU Member States, can actually be legally upheld as against Member States in some kind of legitimate judicial process.

Hungary became a member of the European Union in 2004. On joining it, as any other Member State, agreed

as a condition of its membership to uphold the core values of democracy and the rule of law, and to respect fundamental human rights and freedoms. Indeed it was the first former Communist country to accede to the European Convention on Human Rights ('ECHR') [4].

Moreover, Hungary also became actively involved in shaping EU values and principles. It has worked on the Convention, at the Intergovernmental Conference in 2003-2004 energetically helping to shape Article 2 of the TEU and even introduced the provisions protecting the rights of minorities.

However, the pro-European trajectory in Hungary changed in 2010. A new government was elected with a majority of more than two-thirds of the seats in Parliament. As in many countries adopting the positivist *Grundnorm* [5] constitutional model based on the idea of a written fundamental law, the basic code is partially entrenched and protected from undue unrepresentative political modification. The protective mechanism is the requirement that a written constitution, as the supreme law of the land, can only be changed by the requisite parliamentary majority, often expressed as two-thirds vote in parliament. The 'two-third rule' applies also in the case of the Hungarian constitutional structure.

Indeed, as Georg Jellinek [6] has argued, strong impediments to intemperate amendments of a constitution or nation's fundamental laws, provide protection against precipitate constitutional change and distinguish laws characterised as constitutional laws from all other law. The trouble comes about when a political party in promoting the expediency of its survival, confuses the protected category of constitutional law with 'everyday' law of the land. Any elected party in power only has sovereignty over the everyday law, the limitation on the exercise of this power is the democratic mandate. Only rarely has a political party legitimate authority to change the supreme law.

In the context of the European Union, the idea behind the 'two-thirds rule' impediment is the implicit recognition that reforming a constitution should take place with care and respect for the political views and cultural values of all affected citizens. In order to meet the privileges and corresponding obligations of Union membership, space should be allowed for consideration of the legal mechanisms to protect the fundamental values and principles intended to preserve the rule of law, separation of powers, and the hierarchy of legal norms.

However, without any significant delay, the new government set about a rapid reshaping of the constitutional order of the country. The significant constitutional changes include curbs on the right to freedom of speech and expression, limitations on the rights and welfare of minorities and attacks on the independence of the judiciary and juridical processes.

The Hungarian Parliament approved a new Constitution in April 2011 which has since been amended at least eleven times and Hungary's Fundamental Law has been amended four times, writes Rui Tavares in the *Draft Report on the situation of fundamental rights: standards and practices in Hungary* 'the Tavares Report' [7].



The Tavares Report to the European Parliament raises a number of concerns regarding the effect of the new Constitution and the circumstances of its passing, on Hungary's Treaty obligations as a Member State, especially its continuing commitment to the Union founding values of the rule of law and democracy and its obligation to "...respect human dignity, democracy, equality, the rule of law..."

The Hungarian experience has drawn attention to another further significant problem for the Union. It is that although the European Union is careful to ensure that the constitutional structures of candidate states are fully recognisant of Article 2 TEU principles and values, it seems, that short of expulsion from the Union, the Union

has limited powers to enforce on going protection of the founding values of rule of law and democracy by Member States.

The Tavares Report draws attention to a number of serious points including the following matters:

- It questions the legitimacy of the new Fundamental Law due to the fact that the passing and adoption of the Fundamental Law and the changes to the Constitution “...lacked the transparency, openness, inclusiveness and ultimately the consensual basis that could be expect in a modern democratic constituent process...”. The legislative process was rushed and lacked any meaningful consultation with and scrutiny of the proposals, not only by opposition parties but the population at large.
- It questions the supremacy of the Fundamental Law as a distinct and protected constitutional law, in Jellinek’s sense, and its respect and recognition of a democratic system of checks and balances as a necessary pre-condition for the existence legally constituted democratic Member State of European Union.

The law has struggled to maintain the principle of juridical legality in both senses: as an arena for the protection of constitutional law and as a source of constituting law. On the 28 December 2012 the Hungarian Constitutional Court declared “...that the Hungarian Parliament exceeded its legislative authority when it enacted a number of transitional provisions of the Fundamental Law containing permanent and general rules...”

In response to the legal declaration the Hungarian Parliament passed the Fourth Amendment to the Fundamental Law reintroducing the rules previously declared unconstitutional by the Constitutional Court. This constitutionally questionable but a ‘pure’ manifestation of political power, legitimated only by the electoral system, had the effect of degrading the Constitutional Court. Contrary to the principle of the rule of law, the Court was no longer able to fulfill its function as the supreme body of constitutional protection. Furthermore, the Court could no longer operate effectively as an independent and autonomous constitutional and constituting law making body in the democratic system of checks and balances.

The Tavares Report notes that the Fourth Amendment repealed 20 years of Hungarian constitutional jurisprudence. The repealed rules, principles and laws, expressed a negation of the entire system of founding principles and constitutional requirements including laws dealing with the application of EU law and European human rights law. One effect could be to deny the protection of the founding European principles expressed in Article 2 TEU, and European human rights law to people living in Hungary.

Further, it is generally accepted that an essential feature of the principle of the rule of law is that the judiciary is independent both of parliament and the government. As the Report notes, one key element of judicial independence is the security of tenure for judges. However, contrary to the rule of law principle, the Hungarian government took steps for the premature termination of the appointment of the President of the Hungarian Supreme Court, and introduced lowered compulsory retirement age for all Hungarian judges.

In relation to freedom of expression, and the principle of accountable and open government, the Report discusses the deleterious effect of the Fourth Amendment on the plurality and the vitality of the media environment, citing instances of self-censorship, worsening working conditions for journalists, and reduction in the quality of journalism.

The Tavares Report concludes with the stark warning that unless the “..systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames, and the content of such modification...” is “...corrected in a timely and sufficient manner...” then there arises a “clear risk of a serious breach” by Hungary of the values set out in Article 2 TEU.

Accordingly, it must follow, that should Hungary fail to take steps to correct its apparent trend away from the founding values of “...respect human dignity, democracy, equality, the rule of law...” it is at serious risk of placing itself in not only in breach of its European Union treaty obligations, but also wider international legalities. Furthermore, should the Hungarian government fail to protect the rights of its EU citizens it risks placing itself in breach of European human rights law.

However, if we are to recollect the events leading up to the demise of the Weimar Republic in the 1920's, the Hungarian experience may hint at more sinister possibilities for democracy and the rule of law in Europe.



As Jacobson and Schlink [8] explain, following the Reichstag elections in 1920, the majority parties rejected the Weimar Constitution legally leaving the German Republic with recourse only to the President as the source of constitutional law. The political rejection of the constitution resulted in social and economic instability and legal uncertainty generating much domestic unrest.

In order to try to control the situation, the President declared a number of states of emergency and issued a number of decrees, largely to try to restore public security and order. The exceptional emergency laws were authorised by Article 48(2) of the German Constitution and were implemented *...especially to stabilise the currency and the economy in the “year of crisis 1923”* such that in time the exceptional states of emergency became normalised and out of which legal exception a fresh but inherently undemocratic state could emerge.

Subsequently, “enabling laws” [*Ermächtigungsgesetze*] were passed in the early 1920's which “...transferred extensive legislative powers to the government.” Soon thereafter, the once democratically elected government was able to adopt aggressively totalising political approach to managing and exercising its ‘pure’ power, but only after having successfully transmuted the fragile system of checks and balances necessary for a democracy as an exceptional emergency situation responding to an excess of freedom, diluting the principle rule of law to a formalistic efficiency driven framework.

In the light of our experience of early 20th Century history and the current events in Hungary, we may ask whether the history of Weimar may be repeating itself, presaging a sinister social and political future for Europe, or whether the European Union has sufficient legal and political will to uphold the principles and values of human dignity, democracy, equality, and the rule of law.

The publication of the Tavares Report however encourages an optimistic view that we may not need to repeat history after all.

Footnotes:

[1] See further Council of Europe, The Venice Commission, available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e>

[2] For a copy of the TEU see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT>

[3] A copy of the Charter is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

[4] A copy of the ECHR is available at http://www.echr.coe.int/Documents/Convention_ENG.pdf

[5] Most famously set out by Hans Kelsen in his *General Theory of Law and State*, 1949.

[6] Georg Jellinek 'Constitutional Amendment and Constitutional Transformation' in Jacobson A J., and Schlink B., (eds) *Weimar: A Jurisprudence in Crisis*. (Berkley, Los Angeles, London: University of California Press, 2000) pp54-57 originally appeared in Georg Jellinek *Verfassungsänderung und Verfassungswandlung: Eine staatsrechtlich-politische Abhandlung* (Berlin: Haring, 1906)

[7] European Parliament Committee on Civil Liberties, Justice and Home Affairs *Draft Report on the situation of fundamental rights: standards and practices in Hungary*. No: 2012/2130(INI). 2 May 2013 Rapporteur Rui Tavares

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/935/935253/935253en.pdf

[8] Jacobson A J., and Schlink B., (eds) *Weimar: A Jurisprudence in Crisis*. (Berkley, Los Angeles, London: University of California Press 2000)

Suggested citation: J Ressel 'Democracy and the Rule of Law: The Hungarian Goulash' *Law, Cult. & Ideas Blog* (23 June 2013) (available at <http://lawcultureblog.wordpress.com/>)

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