

The Politics of Constitutional Meltdown

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1. Introduction

This chapter is concerned with the politics of constitutional meltdown. The concept lacks a precise meaning, with the consequence that the terrain is potentially vast. Constitutional meltdown could embrace external challenge to the existing constitutional order, either through forces outside the state, or civil war. War is, as von Clausewitz aptly noted, the continuation of politics by other means. The ‘politics’ of constitutional meltdown thus conceived would then signify the motives for the external aggression, or civil war. This inquiry would, somewhat paradoxically, be uninteresting for the purposes of this chapter. There are multiple causes for invasion or civil war and in such instances the constitution is normally collateral damage, with the consequence that there would be little of interest if meltdown were conceptualized in such terms.

The traditional constitutional order can, however, be shaken internally. This can occur in different ways. It may be driven by insurgent or opposition parties, which regard the undermining of the constitution as part of the strategy for gaining power, more especially where they contend that it does not promote the nation’s ‘real interest’, as exemplified by the rise of the Nazis in Germany. Constitutional meltdown can also be precipitated by government failure to contain domestic disorder, one consequence of which is that it violates the constitution to maintain power through a coup. There are also instances where constitutional meltdown is consciously undertaken by the governing party of the state to enhance its power. It raises

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interesting issues aplenty and is the focus of the ensuing discussion within the allotted space available. The analysis proceeds in four stages.

The discussion begins with the proximate political strategy for such constitutional meltdown. This connotes the method used by those intent on undermining the existing constitutional order. If you are intent on doing so, what do you do and how do you do it. This leads to examination of democratic backsliding, and the ways in which an executive aggrandizes power and emasculates the constitutional status quo. It is exemplified through events in Hungary and Poland.

The focus then shifts to consideration of the underlying political imperative. Concern with the politics of constitutional meltdown cannot rest content with the political techniques used to impinge on the independence of the judiciary or the freedom of the press. We should press further to understand the political impulse and imperative that lies behind this. This is examined in two parts of the chapter, which consider respectively illiberal democracy and competitive authoritarianism, and the ways in which they underscore constitutional meltdown.

The final part of the chapter considers the second order political consequences of constitutional meltdown. This captures the political ramifications of meltdown for institutional ordering outside the particular state, with the principal focus being on the EU. There are, as will be seen, two dimensions to this inquiry. We need to understand why constitutional meltdown in a Member State is important for the EU, and the techniques at its disposal for dealing with the conundrum. We must also press further and understand the broader political implications for the EU of continued membership by states that espouse illiberal democracy.

2. Constitutional Meltdown: Proximate Political Strategy

(a) Democratic Backsliding, Constitutions and Constitutional Order

We begin with the proximate political strategy. It connotes the political method used by those intent on undermining the existing constitutional order. If the governing party wishes to emasculate the constitutional status quo, we are concerned with the chosen political strategy for attaining this end. There is, self-evidently, no single political technique. This is politics, not some scientifically precise exercise. We can but exemplify what has transpired. This is nonetheless instructive, more especially because the inquiry reveals the subtlety for attaining the desired end. Hungary and Poland will be taken by way of example, situated within the frame of democratic backsliding. Constitutions are quintessentially part of the political order and cannot be hermetically sealed off from the institutions that sustain that order. Intentionally orchestrated constitutional meltdown is thus commonly part of the broader phenomenon of democratic backsliding. There is debate as to the extent to which democratic backsliding is generally applicable within Central and East European countries, and as to whether it is meaningful to aggregate all such instances within a single conceptual frame (Cianetti, Dawson and Hanley, 2018; Cianetti and Hanley 2021). There is, however, no doubt that it is evident in certain prominent countries within this area.

Bermeo furnished helpful guidance on this concept, noting that at its most basic it ‘denotes the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy’, and that since there are many institutions that sustain democracy the term can embrace multiple processes (Bermeo 2016, 5). She, nonetheless, points to changes in the modality of backsliding. Election day fraud has been replaced by longer term harassment and manipulation. There have been fewer open-ended coups d’état of the kind common in the Cold War, and more ‘promissory coups’, whereby the coup is framed in terms of defence of democratic legality, coupled with a promise to restore full democracy as soon as possible, even if this is belied by reality. There has also been a decline in traditional executive coups, whereby

there is wholesale suspension of the constitution and arrogation of power by the chief executive in one fell swoop, this being replaced by executive aggrandizement (Bermeo 2016, 10-11).

Elected executives weaken checks on executive power one by one, undertaking a series of institutional changes that hamper the power of opposition forces to challenge executive preferences. Disassembling of institutions that might challenge the executive is done through legal channels, often using newly elected constitutional assemblies or referenda. Existing courts or legislatures may also be used, in cases where supporters of the executive gain majority control of such bodies. Indeed, the defining feature of executive aggrandizement is that institutional change is either put to some sort of vote or legally decreed by a freely elected official—meaning that the change can be framed as having resulted from a democratic mandate.

The modality of backsliding in Hungary and Poland will be examined below. Before doing so, it is instructive to consider more generally the way in which it undermines the virtues of constitutional ordering. Ginsburg and Huq identify four such virtues (Ginsburg and Huq 2014). Constitutions generate legitimacy for the state; they channel political conflict through formal institutions rather than violence; they limit agency costs of government; and they facilitate the production of public goods. These constitutional attributes are jeopardized by democratic backsliding.

Statal legitimacy generated by a constitution is undermined through the executive aggrandizement that is central to backsliding. Constitutions embody the horizontal structural attributes of the system, delineating the legislative, executive and judicial branches of government and their respective powers; they also commonly contain vertical provisions concerning the relation between citizen and state, as epitomized by rights-based protection against the government. The loss of independence, *de facto* and *de jure*, of key state institutions, such as courts, government agencies and the like, undermines the foundations on which the constitution was constructed and the legitimacy that is attendant thereon.

The channelling function of constitutions is endangered through backsliding. Thus, mechanisms that lower the stakes of electoral defeat are important in managing political conflict, with the consequence that ‘if a constitution permits some stakeholders to dominate

others after assuming office, those out of power lose any incentive to stay within the bounds of constitutional competition’ and ‘if the costs of losing office are too high, incumbents will respond by refusing to step down or otherwise seeking to entrench their political power’ (Ginsburg and Huq 2014, 122).

The agency costs of government that prevent office holders from engaging in self-dealing can also be impacted through backsliding. Political term limits can, for example, be indirectly circumvented where those in power ensure that their appointees are entrenched in key positions, whether in courts or agencies, to preserve the longevity of the desired policy. This can also result from amendment to constitutional provisions, and laws made pursuant thereto, whereby tax and expenditure decisions are made to entrench the political status quo, or render it more difficult to change, even if there is change in the governing party.

(b) Democratic Backsliding, Application and Exemplification

Democratic backsliding is evident in the undermining of the constitution in Hungary (Bánkuti, Halmai, and Scheppele, 2012; Scheppele 2019). Rather than overnight breakdown, ‘democratic backsliding is a death by a thousand cuts, in which power-hungry executives slice away at fundamental institutional checks and balances in ways that ultimately distort pluralism and political competition’ (Cianetti and Hanley 2018: 66).

During Hungary’s transition from communism in 1989-1990 the constitutional drafters sought to avoid a parliament in which small parties could not form stable majority coalitions, and also an entrenched constitution that would be too difficult to change. The election law thus favoured larger parties, and the new constitution could be amended by a single two-thirds majority of parliament (Bánkuti, Halmai, and Scheppele 2012,138; Scheppele 2019, 211-12). The election law enabled the Fidesz party in 2010 to secure 68% of the seats in Parliament

based on 53% of the vote, thereby giving it the required two-thirds majority to amend the constitution, which it did twelve times during its first year in office.

This included removal of the constraint concerning the writing of a new constitution, and attacks on the judicial system. The Constitutional Court had for twenty years been an important check on government, and it was therefore important for the success of Fidesz initiatives that it should be disabled. The new Constitution duly provided that the governing party could nominate candidates to the Court, thereby obviating the need for multiparty backing. Fidesz increased the number of judges from eight to fifteen and installed its loyalists in the new positions. It also limited the Court's jurisdiction (Bánkuti, Halmai, and Scheppele 2012, 139; Scheppele 2019, 212), and by constitutional amendment repealed all Constitutional Court decisions prior to 1 January 2012, when the new constitution entered into force, with the result that precedent from earlier decisions could no longer be invoked in new cases (Bugarič and Ginsburg 2016, 73). There were, in addition, serious incursions on the independence of the ordinary judiciary (Sólyom 2015).

The institutional challenge also had other dimensions. The Election Commission was brought under government control, and laws were enacted to curtail press freedom, which included the power to levy hefty fines on media outlets for, *inter alia*, failure to achieve 'balanced' news coverage (Surowiec and Štětka 2020). Fidesz loyalists were entrenched in all major institutional positions, including the Constitutional Court, Budget Council, National Judicial Office, State Audit Office, Public Prosecutor's Office, and National Bank (Krekó and Enyedi 2018, 42).

There have been analogous developments in Poland. A corruption scandal in 2004 tarnished the leftist coalition that had been in power hitherto. This was exploited by the PiS, led by Jarosław Kaczyński, who called for 'a model of centralized power, resembling that which had existed under the previous regime, with more political control from the top and the

curbing of more localized decision making’ (Przybylski 2018, 56). Kaczyński, chairman of PiS, eschewed a formal government position, but controls the legislative and governmental process from behind the scenes. He initiated change similar to that in Hungary.

Laws were enacted that weakened freedom of assembly. The judicial system was undermined through, *inter alia*, the politicization of the judges that sit on the National Council of the Judiciary, which selects judges, and through change that undermined the neutrality of the Constitutional Tribunal (Sadurski 2019). The PiS enacted statutes in blatant violation of the constitution and when the ‘Constitutional Tribunal struck them down, the government refused to publish the decisions of the Court and claimed that therefore the decisions had no legal effect’ (Scheppele 2019, 218). There have, in addition, been changes, legislative and non-legislative, designed to increase the role of political appointees in the country’s election-administration bodies, and other agencies (Przybylski 2018, 59).

The fact that courts, and in particular constitutional courts, have been prominent targets in Hungary and Poland, and other countries such as Romania, should come as no surprise (Bugarič and Ginsburg 2016, 72; Bochsler and Juon 2020, 173). The power of constitutional courts to review the constitutionality of statutes was a bulwark against untrammelled governmental power, as forcefully exemplified by the Hungarian Constitutional Court, under the leadership of former chief justice László Sólyom (1990–98), and by the constitutional courts in Poland, Slovenia, Slovakia, and Romania in the post-communist era. They were clearly obstacles to the direction of travel desired by Hungary and Poland in more recent years. It is important at this juncture to note two related political features of these general developments that renders them especially problematic.

There is, on the one hand, the fact that we ‘now face forms of democratic backsliding that are legitimated through the very institutions that democracy promoters have prioritized: national elections, voting majorities in legislatures and courts, and the “rule” of the laws that

majorities produce’ (Bermeo 2016, 15). Challenging laws crafted by democratically elected executives and legislatures can be difficult, more especially when changes in the rules governing elections and the like in established democracies is not uncommon.

There is, on the other hand, the fact that the constitutional assault is often quite skilful. This is in part because it is piecemeal. It is in part because the architects of such change can point to the fact that the modifications bear some analogy to the situation that prevails in established democracies. Thus, as Scheppele notes, legalistic autocrats commonly contend that their amendments or laws bear comparison with practice elsewhere, whether they relate to the number of judges on a Constitutional Court, their manner of appointment, the size of election districts, the existence or not of a bicameral legislature and the like. The consequence is that ‘these new legalistic autocrats talk the talk of constitutionalism while not walking the walk, which means that they run afoul of the dominant normative consensus in practice while appearing to honour it in theory’, with the intent of pulling up the ‘constitutional ladder after themselves so that no one else can win the next election’ (Scheppele 2019, 199, 201; Scheppele 2013; Scheppele 2018).

3. Constitutional Meltdown: Underlying Political Imperative – Illiberal Democracy

(a) Illiberal Democracy, Origins and Meaning

The discussion thus far has addressed the politics that underpin constitutional meltdown viewed from a proximate perspective, connoting the political mechanisms used to aggrandize executive power and undermine the constitutional status quo. The focus now shifts to consideration of the deeper political impulse that has driven such developments. The desire to embed the power of the governing party is clearly a consideration in this respect. It would, nonetheless, be

mistaken to regard this as the sole factor. A plethora of considerations can be discerned, as attested to by the literature.

Prior to 1989 there was considerable convergence between democratic aspiration and liberalism. The former dissidents who became leaders thereafter failed, however, to institutionalize pluralism in the form of lasting and viable political parties. Paradoxically the principal exception was Fidesz, which was transformed to become the conservative populist party that it is today. More recent years have witnessed the rise of populism and the decoupling of liberalism from democracy. This led to discourse on illiberal democracy, the term having been coined by Zakaria at the end of the previous millennium, (Zakaria 1997). It is, however, clear that the concept of illiberal democracy encapsulates multiple ideas (Galston 2018, 8).

Well before the covid-19 outbreak, antiliberal politicians and intellectuals had issued a complex bill of particulars against liberalism. Populists charged that liberalism had become a cloak for antidemocratic elitism that took power away from rank-and-file citizens while undermining their economic interests. Nationalists alleged that liberalism bred international institutions and laws that invaded nations' sovereignty and hobbled the pursuit of legitimate national interests. Cultural traditionalists claimed that liberal individualism eroded moral and religious communities and that liberal freedom erased the distinction between liberty and license. If everything is a matter of choice, they argued, then everything is permitted, and nihilism is inevitable.

This is not the place to engage in detailed analysis of these claims. We must, nonetheless, unpack and understand them, in order to comprehend the politics of constitutional meltdown, which is the subject matter of this chapter.

(b) Illiberal Democracy, Mimesis and Economics

There is little doubt that there has been a turn towards illiberal democracy in some Central and East European countries. The causes of this shift are, however, more complex than commonly imagined.

Krastev and Holmes highlight the ‘pent-up animosity engendered by the centrality of mimesis in the reform processes launched in the East after 1989’ (Krastev and Holmes 2018, 118). They argue that the region’s illiberal turn cannot be grasped apart from the political expectation of “normality” created by the 1989 revolution and the politics of imitation that it legitimized. This is echoed by other writers, who note that ‘conservative groups and social movements chafed at liberalism’s assumption of its natural superiority’ (Bill and Stanley 2020, 381). On this view the dominant narrative post-1989 was no longer that between communists and democrats, but rather that between imitators and the imitated. The idea is captured in the following extract (Krastev and Holmes 2018, 118, italics in the original).

East-West relations morphed from a Cold War standoff between two hostile systems into a moral hierarchy within a single liberal, Western system. While the mimics looked up to their models, the models looked down on their mimics. It is not entirely mysterious, therefore, why the “imitation of the West” voluntarily chosen by East Europeans three decades ago eventually resulted in a political backlash. What makes imitation so irksome is not only the implicit assumption that the mimic is somehow morally and humanly inferior to the model. It also entails the assumption that Central and Eastern Europe’s copycat nations accept the West’s right to evaluate their success or failure at living up to *Western* standards. In this sense, imitation comes to feel like a loss of sovereignty.

The backlash against mimesis was then exacerbated by the 2008 economic crisis. For Central and Eastern Europeans this was proof positive that the economic liberalism that underpinned the Western model was failing on its home turf. It was ‘as if they had been told to imitate the globally dominant West just as the West was losing that very dominance’ (Krastev and Holmes 2018, 119). Scepticism concerning economic liberalism was matched by mistrust of Western cosmopolitanism. Central and East Europeans ‘have no confidence in those whose hearts are in Paris or London, whose money is in New York or Cyprus, and whose loyalty belongs to Brussels’ with the consequence that ‘being cosmopolitan and at the same time a “good” Bulgarian, Czech, Hungarian, Pole, or Slovak is not on the cards’ (Krastev 2016, 93). There has, moreover, been a shift in the political allegiance of blue-collar workers from the

moderate left to the right, such that ‘the internationalist-minded working class is no more, having faded along with Marxism’ (Krastev 2016, 95).

(c) Illiberal Democracy, Populism and Culture

There is also a populist and cultural dimension to the political imperative underlying developments in Central and Eastern Europe, which has in turn been shaped by developments in the West.

This is not the place for detailed exegesis on the meaning of populism. Suffice it to say for the present that a key feature is that populists claim that they alone represent the people, this being a moral, rather than an empirical claim, and that the people must be defended against a corrupt elite (Müller 2016; Mudde 2004; Blokker 2019). Thus, Kaczyński and Orbán claim to represent true Poles and Hungarians respectively (Krastev 2016, 91; Bochslers and Juon 2020, 176; Hanley and Vachudova, 2018). This then translates into the claim by populist parties that they have a monopoly to represent the people, as attested to by its electoral majority, which ‘provides authorization to cast off the constraints of the constitution or to revise it’ (Rupnik 2018, 26). This is reflected in, for example, the PiS response to critique from the opposition or the European Commission to its legislative initiatives. The response is framed in terms of a narrative of sovereign democracy, whereby the party with the majority of seats in Parliament represents the sovereign will of Poland, which is said to place the legitimacy of its action above question (Przybylski 2018, 59). In similar vein, leaders such as Orbán contend that liberal democracy is only one option among others. The concept of illiberal democracy is not used defensively, but rather is said to betoken a preferable model that better reflects and protects the national interest. Populism thus conceived is linked to resurgence of nationalism. In 1989, the advent of democracy marched hand in hand with the return of nationalism in the break-up of the Soviet empire. In the last decade by way of contrast, the mantle of legitimacy passed ‘from

technocratic liberalism to populist nationalisms that harbour an organic conception of the nation as a historic, cultural, and religious community that the state must protect’, which is then linked with ‘the affirmation of national sovereignty against EU interference, whether this takes the form of issuing warnings about attacks on the rule of law or imposing quotas for accepting migrants’ (Rupnik 2018, 27; Vachudova 2020). Sata and Karolewski coined the term Caesarean politics to capture, inter alia, the political strategy of ‘constructing enemies and traitors to the national cause that is claimed to be represented by the government leader/party alone, thus questioning the legitimacy of pluralism’, with the strategy taken forward through an admixture of patronage, state capture and exclusionary identity politics (Sata and Karolewski 2020, 207).

The populist strain within some Central and East European countries is reinforced by cultural argumentation. During the Cold War conservative Poles regarded the West as normal because it cherished tradition and believed in God. By way of contrast, Western normality now embraces secularism, multiculturalism, and gay marriage. It is unsurprising that there should be reticence about such ideas in parts of Central and Eastern Europe, more especially because ‘openness to the world, for large swaths of the Central and East European electorate, connotes not freedom but danger: immigrant invasion, depopulation, and loss of national sovereignty’ (Krastev and Holmes 2018, 124; Sata and Karolewski 2020; Enyedi 2020, 366-9). For Central European countries the proposed redistribution of migrants across national borders according to European Commission quotas was an attempt ‘to impose on them a multicultural model of society that they consider a failure’ (Rupnik 2018, 33). These concerns were heightened during the 2015 migration crisis (Przybylski 2018, 62).

In connection with the 2015 migration crisis, the “Antemurale myth” of Central European nations as the bulwark protecting Christian Europe from foreign invaders emerged as a central element of the dominant political ideology in Hungary. As it took on this role, the myth also underwent a revival in Poland and spread easily to Slovakia, the Czech Republic, and elsewhere. This narrative presents refugees and migrants as something close to military forces mobilized and on the march through Europe. Since the indifferent elites of the spoiled West will not repel them, Poland

and Hungary must do so. This myth may partially explain the paradox that many people in the region remain pro-European (70 percent of Poles see EU membership as “a good thing”) while at the same time backing their governments’ illiberal turn.

4. Constitutional Meltdown: Underlying Political Imperative – Competitive Authoritarianism

There is a further dimension to the political imperative that underlies constitutional meltdown. Competitive authoritarianism overlaps with discourse concerning illiberal democracy, but nonetheless furnishes important insights that are pertinent to the politics of constitutional meltdown.

(a) Competitive Authoritarianism, Origins and Development

Steven Levitsky and Lucan Way did the pathbreaking work on competitive authoritarianism at the turn of the new millennium (Levitsky and Way 2002), followed by a monograph at the end of the first decade. The concept had the following connotation (Levitsky and Way 2010, 5).

[C]ivilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents’ abuse of the state places them at a significant advantage vis-à-vis their opponents. Such regimes are competitive in that opposition parties use democratic institutions to contest seriously for power, but they are not democratic because the playing field is heavily skewed in favor of incumbents.

They revisited the topic, after the passage of a further ten years (Levitsky and Way 2020). Competitive authoritarianism was a post–Cold War phenomenon, the result of an environment that was hostile to full-scale dictatorship. The collapse of Soviet communism went hand in hand with a period of circa 15 years in which Western liberal hegemony held sway. This, coupled with promotion of democracy, meant that ‘the cost of outright dictatorship became prohibitively high’ (Levitsky and Way 2020, 52), more especially so in countries where linkage to, or leverage by, the West was strong (Levitsky and Way 2020, 52).

The post–Cold War international environment favored the rise of competitive authoritarianism. As multiparty elections spread across the globe, countries with reasonably favorable domestic conditions (including Mexico, Poland, South Africa, and Taiwan) generally democratized. But multiparty rule also diffused to many states with highly unfavourable conditions for democracy: impoverished countries with dysfunctional states, tiny middle classes, and weak oppositions and civil societies (such as Benin, Haiti, Madagascar, and Mali); post-communist countries with oversized states and undersized private sectors and civil societies (Armenia, Belarus, Russia, and Ukraine); or countries characterized by all of these conditions (Albania, Cambodia, North Macedonia, and Romania). These were countries that, according to nearly all existing social-science research, “should” have been authoritarian, but external pressure compelled their elites to permit a degree of pluralism and electoral competition. Thus, regimes that would very likely have been outright dictatorships in another historical context became hybrids during the post–Cold War era.

There was, however, considerable change in the international environment in the new millennium. The power of Western liberalism waned, while that of China and Russia increased. There was a decline in Western linkage and leverage, thereby reducing its ability and capacity to promote democracy. This in turn reduced the costs of engaging in competitive authoritarianism. Thus, while most such regimes that existed in Central and Eastern Europe and the Americas had democratized by 2004, subsequent years have witnessed the re-emergence of competitive authoritarianism, such that in 2019 six of the thirty-two such cases are in the Americas and Central and Eastern Europe (Levitsky and Way 2020, 54). The relative weakness of democratic institutions facilitates the return of competitive authoritarian regimes (Bieber, 2018).

(b) Competitive Authoritarianism, Persistence and Form

The preceding discussion leads to further inquiry, as to why competitive authoritarianism persists. This is prompted by the earlier discussion, which begs the question as to why such regimes did not become more fully authoritarian, given that the costs of compliance with Western ideals of democracy and liberalism had diminished. For Levitsky and Way international and domestic considerations are pertinent.

From the international perspective, ‘the liberal West may be down, but it is hardly out’, given that Western democracies remain among the world’s most influential states (Levitsky and Way 2020, 56), as attested to by the fact that nine of the world’s ten largest economies are established democracies. Russia and China had hitherto sought to spread communism, but more recently have sought to ‘support geopolitical allies and weaken rivals, rather than to promote authoritarianism per se’ (Levitsky and Way 2020, 56).

From the domestic perspective, there are several reasons why competitive politics persists, as opposed to authoritarianism per se. Thus, ‘many contemporary autocrats lack the institutional capacity to eliminate opposition and to maintain the internal cohesion required for the consolidation of hegemonic rule’ (Levitsky and Way 2020, 57). Competitive politics and elections lend legitimacy to the victor, even where the playing field is tilted to its advantage, as exemplified by the situation in Poland and Hungary. This is coupled with the fact that recourse to domestic authoritarianism per se for countries that had previously been under the yoke of external authoritarianism may well be resisted by the populace, even if a majority is willing to accept the milder form of competitive authoritarianism in which the executive aggrandizes power in the manner adumbrated above. This is more especially so for countries that are less obvious ‘candidates’ for competitive authoritarianism. Thus, many competitive authoritarian regimes emerged in countries where the conditions were unfavourable for democracy, where there was little by way of democratic tradition, low income per capita and weak institutions that could be more readily swayed. In countries where democratic traditions are stronger, where there is an established middle class, a vibrant civil society and stronger institutions, authoritarianism per se is less likely to be accepted, hence the incentive for those so minded to press for competitive authoritarianism that enables the power holders to claim the legitimacy that comes with electoral success, even where this is achieved at the cost of undermining the formal and substantive precepts of the constitution.

(c) Competitive Authoritarianism, Stability and Durability

There are interesting issues concerning the stability and durability of competitive authoritarianism across time. It is clear that the list of competitive authoritarian regimes is not static (Carothers 2018). The thirty-five such regimes examined by Levitsky and Way in 2010 followed very different paths between 1990 and 2019: fifteen democratized; six democratized, but regressed; four became fully authoritarian; and ten remained continuously competitive authoritarian. However, competitive authoritarianism also emerged in new countries. In some instances, this was the result of the shift from hegemonic rule to competitive authoritarianism; in others, such as Bolivia, Hungary, Poland, the Philippines, Turkey, and Venezuela, the trajectory was from democracy to competitive authoritarianism (Levitsky and Way 2020, 51). There can, nonetheless, be questions as to whether it is correct to characterize a particular regime as competitive authoritarian or authoritarian. It is, moreover, noteworthy that elements of competitive authoritarianism are evident in more established democracies, as exemplified by Matteo Salvini in Italy and some policies pursued by Donald Trump in the USA.

It is equally clear that the durability of any particular regime is, paradoxically, both reinforced and limited by the very features that render it competitively authoritarian. It is reinforced for the reasons adverted to above: electoral success lends legitimacy to the regime, which is strengthened by the espousal of illiberal democracy built on a populist base. However, such regimes ‘often see their stability erode precisely because they feature relative political openness and competition, at least compared to fully authoritarian regimes’ (Carothers 2018, 130). Thus, while life is difficult for the opposition in such regimes, there is still the possibility to challenge the governing elite, and ‘an uneven playing field is better than none at all’ (Carothers 2018, 132). The dominant party must, moreover, be wary lest electoral manipulation triggers protest that destabilizes the status quo. There is, in addition, an inherent tension within

competitive authoritarianism, insofar as it seeks to draw legitimacy from democracy while weakening the level playing field that provides its normative foundations, which at the same time deprives it of the ability openly to claim some alternative ground of legitimacy (Carothers 2018, 133).

5. Constitutional Meltdown: Second-Order Political Impact

(a) Constitutional Meltdown, the Rule of Law and Independence of the Judiciary

The preceding discussion has revealed the constitutional problems that beset Hungary and Poland. This has in turn had a second-order political impact on the EU, more especially in relation to the rule of law problems posed by the incursions on judicial independence.

An independent judiciary is an especially significant component of the rule of law, and central to the workings of the constitutional order (Craig 2019). Thus, it is fundamental to any conception of the rule of law that the government should act on a basis deemed valid by that legal system. If the government or legislature exceeds the boundaries of its lawful authority, including its constitutional authority, then its action will be null or invalid. There must be independent courts to assess, in an objective manner, whether the limits on such authority have been exceeded. If the courts lack such independence, or are subservient to the will of the political branch of government, then there is a real danger that fundamental limits on the scope of political power will be ignored.

The judiciary must also be independent in order to give legal effect to other precepts of the constitution, such as the protection of fundamental rights, the proscription of retrospective laws, or control of laws that inhibit access to court. If the courts lack independence, then they will not protect such constitutional precepts, or will interpret them unduly narrowly to the advantage of the executive. Whether they fail wholly in this respect depends on the extent to

which their independence is compromised. Independence is not a unitary concept. It can be compromised to different degrees, with variables including the period of time for which this infirmity lasts, and the class of case that it affects. Where the lack of judicial independence is systemic, where it is deep-rooted and long-lasting, then the effect is most damaging. In such circumstances, the courts will not protect individual rights, they will allow retrospective legislation to stand, and they will fail to safeguard citizens against laws or executive action that unduly circumscribes their access to court.

Judicial independence is especially pertinent in the EU context, since the problems at state level shake the foundations of the EU's constitutional order. This is in part because mutual trust between national courts is integral to the European Arrest Warrant regime that constitutes the core of the Area of Freedom, Security and Justice. It is in part because national courts are central to the regime of EU adjudication. They have the obligation to conform to and apply EU law within their jurisdiction and are central to the flow of cases upwards to the CJEU, via the regime of preliminary references in Article 267 TFEU that lies at the core of the EU legal order. If national courts lack independence then the regime of EU adjudication will suffer in both respects. National courts that lack independence may not apply EU law correctly, and they may restrict the flow of preliminary references where there are challenges to national legislative or executive action that is contrary to EU law.

The EU has deployed numerous strategies to combat the rule of law problem and democratic backsliding, including: the Commission's rule of law framework; the Council's annual rule of law dialogue; infringement proceedings under Article 258 TFEU and preliminary rulings using Article 267 TFEU; invocation of Article 7 TEU; the rule of law cycle; and the conditionality regulation rendering EU monetary assistance dependent on compliance with the rule of law. This is not the place for detailed exegesis on such measures, which have been discussed extensively in the literature (von Bogdandy and Sonnevend 2015; Closa and

Kochenov 2016; Jakab and Kochenov 2017; Kochenov and Pech 2015; Pech 2021). Suffice it to say for the present that democratic backsliding has caused significant second order political implications for the EU, which it has striven to address with limited success.

(b) Constitutional Meltdown, Regional Responsibility and Regional Capacity

There is, however, a further dimension to the politics of constitutional meltdown as it affects the EU, which merits consideration. It is the balance between regional responsibility and regional capacity. Consider the following.

It is axiomatic that the principal focus for protection of the rule of law and constitutional propriety is the state itself. Reflect for a moment further on the assumptions underlying this sentiment. They are grounded on an admixture of power and responsibility. It is the state that has plenary authority within its borders, which carries the commensurate responsibility for ensuring that the precepts of constitutionalism and the rule of law are adhered to.

If there are failings in this respect then the traditional recourse is to international law. The errant state may be condemned in international organizations for failure to comply with the rule of law. Such missives are important, but they are nonetheless bounded, both formally and substantively. The formal powers of such organizations are circumscribed and the conditions for their exercise often require a political consensus that may not be forthcoming. The bottom line is that while we might expect international condemnation we do not have high hopes for causal impact on the situation on the ground. We ‘discount’ in advance the extent to which such intervention can really change matters. There is moreover evidence that intervention by international institutions can backfire (Adamski 2019).

This brings us to alleviation of such problems at the regional level. In Europe the two principal regional organizations are the Council of Europe and the European Union. Their

powers are very different, as is their expected impact on rule of law problems at national level. This in turn affects our expectations of what they can achieve. The Council of Europe has made significant contributions to preservation of the rule of law. This is in part through the European Court of Human Rights, and in part through the work of the Venice Commission for Democracy through Law. The salient point for present purposes is that they have done broadly what is expected of them.

By way of contrast, we expect a lot from the EU, and we are critical when results fall short of expectations. There is no doubt that we should be mindful of shortcomings of the EU institutions in this regard, including instances where the Commission has been tardy in bringing enforcement actions against the recalcitrant Member State. We should, however, also pause and reflect of what we can expect from the EU to redress these problems. Its power and responsibility are bounded in a number of respects.

First, the EU is not a state, nor did it take the reprehensible action in relation to the judiciary. This was taken by the Polish and Hungarian governments, and the action was not causally dependent on their EU membership. These states met the Copenhagen criteria for accession, which include compliance with democratic precepts. The desire for EU membership spurred democratization (Bochsler and Juon 2020; Karlsson and Galic 2016). The problems occurred thereafter, and the governments sought power over the judiciary for reasons that transcended anything to do with EU membership, and this is so notwithstanding the fact that the result would be that the non-independent courts would be less likely to apply EU rulings which the governing parties disliked.

Secondly, the EU has attributed power, it does not have plenary authority. It must therefore work within the parameters of what the Lisbon Treaty allows. Truth to tell, the EU has been pretty good at using a plethora of techniques to try to address the rule of law problem, and has deployed broad Treaty interpretation to good effect, as exemplified by judicial use of

Article 19 TEU, and Article 258 TFEU. The fact remains that the Treaty still imposes limits on what the EU can do, and how it can do it. Thus, the powers in Article 7 TEU were devised implicitly on the assumption that there would only be one ‘bad’ state at any one point in time. The decisional rules thereunder reflect this. If there are two or more such states then use of Article 7 TEU becomes a whole lot more difficult.

Thirdly, the EU is bounded by rules for political decision-making, that are grounded in Treaty provisions, and these can be used by the defaulting states as shields to blunt the force of EU initiatives to deal with rule of law backsliding. This is regrettable to say the least, but predictable in the sense that a rational defaulting state will naturally draw on legal rules to shape the political terrain when it can do so. This is exemplified by the passage of the latest initiative designed to impose rule of law conditionality through cuts to the contributions from the EU budget that go to defaulting states. The political deal-making on this was conducted under the shadow of threats from Hungary and Poland to veto approval of the general EU budget. There is no doubt that the resultant measure could have been stronger, but whether it would have been enacted in such a form is doubtful, given the political/legal dynamics adumbrated above. We should be wary of the best being the enemy of the good.

Fourthly, there is the related, albeit distinct, consideration of what has been termed authoritarian equilibrium. This captures the idea that ‘where an authoritarian leader in an EU member state delivers votes to an EU-level political coalition – such as a party group in the European Parliament – its EU-level co-partisans will have incentives to tolerate its democratic backsliding and shield it from EU sanctions’, provided that the national leader does not go too far, such as to become an electoral liability for its ‘co-partisans in Strasbourg and national capitals and lose their protection’ (Kelemen 2017, 217).

There is no doubt that constitutional infirmity and rule of law backsliding represents a significant second-order political problem for the EU. It calls into question the enforceability

of CJEU judgments, and casts a long shadow over the degree to which national courts trust those in the countries beset by incursion into the independence of the judiciary. In more general terms, there are far-reaching dangers for the EU, if membership includes countries that undermine central precepts of the rule of law.

6. Conclusion

The preceding discussion has considered the politics that underlie constitutional meltdown. It has included analysis of the proximate political strategy, the deeper political imperative driving this and the second order political consequence. There is doubtless more that could be said over and beyond this. However, exigencies of space preclude consideration of broader issues concerning, for example, the extent to which belief in basic precepts of democracy may be waning (Foa and Mounk 2017; Howe 2017). We should, moreover, be mindful that constitutional meltdown can assume very different forms, and that the politics that underscores this may differ accordingly. Thus, if a constitution is relatively ‘thin’ it will perforce mean that more issues will be dealt with through an admixture of legislation that fleshes out the constitutional principles, combined with constitutional adjudication. In federal systems there will be issues as to the locus of constitutional authority to enact the legislation. Disruption to accepted understandings of constitutional order can then play out in legislation enacted at state level, where the intent and effect is to limit the voting rights of supporters of a political party. The dangers that this poses for the health of democracy and the vitality of the constitution are very real, as exemplified by recent developments in the USA (Persilly & Stewart 2021).

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