THE FUTURE OF THE RULE OF LAW AND DEMOCRACY IN EUROPE

ABSTRACTS BOOKLET

NOVA UNIVERZA
FACULTY OF EUROPEAN AND GOVERNMENT STUDIES
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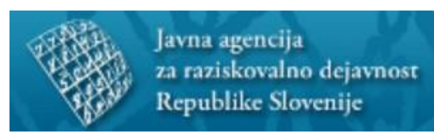
Lecture hall P1, 14 December 2018



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PROGRAMME

9:00 – 9:15	**Welcome Addresses** Gorazd Justinek, *Dean of Faculty of Government and European Studies, Nova Univerza* Marko Novak, *Dean of European Faculty of Law, Nova Univerza*
9:15 – 10:15	**Keynote Speech** Martin Mits, *Judge on behalf of Latvia at the European Court of Human Rights*
10:30 – 17:00	**Academic sessions**
10:30 – 12:00	**Panel 1: The View from the "North" and the "South"** Commentator: Matej Avbelj
	– Daniel Augenstein, *Tilburg University* – Giuseppe Martinico, *The Sant'Anna School of Advanced Studies, Pisa* – Maria Varaki, *King's College London* – Cormac Mac Amhlaigh, *University of Edinburgh*
13:00 – 15:00	**Panel 2: The View from V4** Commentator: Gorazd Justinek
	– Gabor Attila Toth, *Humboldt University, Berlin* – Zdenek Kuehn, *Masaryk University, Brno* – Miroslaw Wroblewski, *Office of the Commissioner of Human Rights of the Republic of Poland* – Kamil Branik, *Comenius University, Bratislava*
15:30 – 17:00	**Panel 3: The View from Central and Eastern Europe** Commentator: Jernej Letnar Černič
	– Anna Dolidze, *High Council of Justice of the Republic of Georgia* – Mart Susi, *University of Tartu* – Đorđe Gardašević, *University of Zagreb*

The Rule of Law in Slovenia

Reform of democratic and rule-of-law state in Slovenia (Slovenian Research Agency, 2016-2018), Graduate School of Government and European Studies, Brdo pri Kranju, Slovenia

Project summary

The global aim of the proposed research project is to investigate the state of democracy and rule of law in Slovenia and to develop proposals for their reform. The project examines whether and how has the Council of Europe (COE) through the European Court of Human Rights and the European Union (EU) through the European Court of Justice have influenced the conditions for democracy and rule of law in Slovenia. The project will investigate how Slovenian judicial, legislative and executive branches safeguard the democracy and rule of law. This research project will focus also on the question of how effective is the safeguarding of the human rights and fundamental freedoms in Slovenian legal order. It will study why democratic and rule of law state deficiencies are still present in the Slovenian legal order despite the influence of the Council of Europe and the European Union. In this way, it will identify the inadequacies and deficiencies in the Slovenian public sphere and devise solutions as to how the identified disadvantages can be removed. The central research question of the project therefore is: how to reform democracy and the rule of law in Slovenia.

The rule of law in Slovenia is in a systemic crisis. This proposition, unfortunately, requires no support in an in-depth comparative law analysis. It suffices to have a short glimpse at the jurisprudence of the European Court of Human Rights, which demonstrates the degree of Slovenia's compliance with the European Convention of Human Rights. It follows from this case-law, that the rule of law in Slovenia is failing in all those areas, which are essential for the individuals. Slovenia has been thus convicted for torture, police violence, medical mistreatments and lack of their investigation, for failing to ensure the right to family life in particular by the centres for social work. Furthermore, in its landmark Lukenda pilot-judgment the ECtHR went so far as to proclaim that the Slovenian violation of the right to a trial within a reasonable time is "a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice. The problem continues to present a danger affecting every person seeking judicial protection of their rights." Not infrequently the judicial proceedings in Slovenia take place in a selective way, so that the individuals, who are close to the centres of formal and informal power, ultimately escape the arm of justice. In so doing, the very foundations of the rule of law, which lie in the principle of equality before the law, are eroded. The state which falls short even of the formal requirements of the rule of law, which is what the equality before the law stands for, is not and cannot be said to comply with the rule of law.

Substantively the project will be broken down into four parts: the first part will look into the historical reasons, in particular into the socialist legacy, for the present state of affairs in the field of rule of law and democracy in Slovenia. The second part will focus on the endogenous factors influencing, positively or negatively, the rule of law and democracy in Slovenia from 1991 till present. This part will also have an important comparative dimension, analysing the Slovenian experience in rule of law and democracy building in comparison with other transitional countries as well as the countries that could be qualified as well-ordered societies. The last two parts will be devoted to exogenous factors. The third part will study the democratization and progress of rule of law in Slovenia under the influence of the ECHR. The fourth and final part will do the same with regard to the influence of EU law.

The envisaged duration of the project is three years; it will be carried out as a joint research work of the main applicant, the Graduate School of Government and European Studies, and European Faculty of Law. The mere technical realization of research will take place under the above-presented research methods specific to the law. Therefore, the vast majority of our work will be done in libraries, at domestic faculties, as well as in specialized libraries in Slovenia and, if necessary and possible at foreign universities with whom we have cooperated in the past. The relevant literature will be studied in libraries, where also the writing of a monograph will take place. These two types of activity will take by far the largest share of research hours on the project.

Among the expected results of the project is the publication of a monograph on the reform of democratic and the rule-of-law state. In a period of three years we will be publish four peer reviewed articles in reputable national and international journals. We will organize three international conferences on the theme of the project. Expected results will be presented at national and international conferences in the field of constitutional law and human rights law. The results will be presented to local and international NGOs. In the civil context, the results will be presented to the stakeholders working in the field of democratic and rule of law and protection of human rights.

Conference summary

This conference marks the end of the research project on the reform of the rule of law and democracy in Slovenia. Its objective is two-fold. First, to present the main findings of the research project, which has been concerned with the past and present state of the rule of law and democracy in Slovenia within a broader (Central) European context. Second, using the hence identified findings, to reflect on the possible future scenarios of the evolution of the rule of law and democracy in Europe. As the research project has determined, while Slovenia suffers from its own specific rule of law and democracy problems, these are simultaneously part of a general trend of a gradual retreat of democracy and the rule of law across Europe, but in particular in the post-communist countries.

The conference will contextualize the Slovenian debate into a broader European context, shedding light on the more or less shared challenges from the European North, South and the East. This part will be introduced by a keynote lecture by Dr Martin Mits, judge on behalf of Latvia at the European Court of Human Rights.

INVITED KEYNOTE SPEECH

Dr Martin Mits

Judge on behalf of Latvia at the European Court of Human Rights

RULE OF LAW IN EUROPE AND CASE LAW OF EUROPEAN COURT OF HUMAN RIGHTS: IS THERE A REASON FOR CONCERN?

Mārtiņš Mits, European Court of Human Rights

Abstract

All 47 Member States of the Council of Europe must accept the principles of the rule of law and the protection of human rights. The European Convention of Human Rights (the Convention) itself is based, inter alia, on the common heritage of the rule of law. As explained by the Venice Commission, it penetrates the Convention standards through such concepts as legality, legal certainty, prohibition of arbitrariness, access to justice. It also relates to the respect of judicial decisions and their execution.

The presentation aims at exploring whether the recent case law of the European Court of Human Rights (the Court) gives a reason for concern in terms of the very fundaments on which the European system for the protection of human rights is based. It focuses on two principal areas: (1) independence and impartiality of the judiciary (Article 6) and (2) the prohibition of the abuse of restrictions on rights (Article 18). The former is explored on the basis of such judgments as Volkov v. Ukraine and Baka v. Hungary involving aspects of the wide scale judicial reforms and disciplinary proceedings that both pose a threat to the judicial independence. The latter is addressed primarily on the basis of recent Grand Chamber judgments in the cases of Merabishvili v. Georgia and Navalniy v. Russia attesting to the fact that Governments may act with ulterior purposes detrimental to democracy. Significant developments in the Convention system, namely the case of Burmych v. Ukraine and the proceedings initiated by the Committee of Ministers in the case of Mammadov v. Azerbaijan, concerning the issue of the execution of judgments are also viewed in the light of the topic.

Overall, the examined case-law signalises that there are flashes of Convention violations which give a reason for concern about the existence of problems on the level of fundamental principles and this conclusion is not limited only to one member state.

ACADEMIC SESSIONS

THE RULE OF WHAT? LAW, POPULISM AND AUTHORITARIAN CAPITALISM

Daniel Augenstein, University of Tilburg

Abstract

Germany is among those Western democracies that currently experience a sharp increase in the popularity of right-wing political movements ("Rechtsruck"). These movements reinterpret the rule of law from a principle that integrates modern pluralistic societies to an expression of the will of "the people" immanent in the nation. The presentation aims to explain this development by examining the interplay between right-wing populism and authoritarian capitalism.

THE SLOVAK UNDERSTANDING OF THE CONCEPT OF THE RULE OF LAW

Kamil Baraník, Comenius University Bratislava

Abstract

The contribution will examine so-called "external influence" on the Slovak understanding of the concept of rule of law and thereby also on the entire national legal system. More specifically, it will explore how the Slovak accession to the Council of Europe and EU have affected the Slovak constitutional order. The contribution will focus mostly on the decision-making of the Constitutional Court towards the EU law and on the ECHR's position in the Slovak legal order but will also draw from the Slovak political experience. The contribution will conclude with several remarks on how external legal spheres changed the Slovak legal domain. The belief of the author is that the conclusions, after some adjustments, could be applicable also to the broader Central European region.

THE VENICE COMMISSION AND THE CROATIAN CONSTITUTIONAL COURT (THE USE OF THE „SOFT LAW“ ARGUMENTS IN THE CASE-LAW OF THE COURT)

Đorđe Gardašević, University of Zagreb,

Abstract

The principle of the rule of law makes one of the so-called "highest values of the constitutional order of the Republic of Croatia" and as such it serves as one of the grounds for interpretation of the Constitution. In further working out of the principle, the Constitution states that in the Republic of Croatia laws shall comply with the Constitution while other rules and regulations shall comply with the Constitution and law. To this, the Constitution also adds that everyone shall abide by the Constitution and law and respect the legal order of the Republic of Croatia. On the other hand, the Constitutional Law on the Constitutional Court of the Republic of Croatia prescribes that the Court shall guarantee compliance with and application of the Constitution and that it shall base its work on provisions of both the Constitution and the said Constitutional Law. In short, the mentioned constitutional provisions seem to determine the scope of review exercised by the Court, most notably its methods of legal interpretation.

In some rather crucial decisions it delivered in the past few years, however, the Croatian Constitutional Court, in construing its arguments, relied also upon the opinions of the European Commission for Democracy through Law (Venice Commission). Notable examples thereof include cases that dealt with constitutionally guaranteed rights (electoral rights of national minorities), competences of the Parliament and the government (the 2015 referendum cases) and the specific issue of the unconstitutional constitutional amendments.

In this presentation I am giving an overview and critical evaluation of those developments in the case-law of the Croatian Constitutional Court. The specific issue I am addressing is how far the Court should really go in taking into account the general standings of the Venice Commission in resolving the actual cases.

THE RISE OF ILLIBERALISM IN CENTRAL EUROPE

Zdeněk Kühn, University of Brno

Abstract

The constitutional courts in Central and Eastern Europe were crafted as powerful institutions capable of protecting new liberal democracies, separation and balance of powers and human rights in the region. The drafters of new constitutions acted in a clear reaction to the past injustices and communist dictatorships. Initially, in the course of the 1990s the optimism surrounding the work of the post-communist constitutional courts dominated the constitutional narrative. Less than two decades after the fall of communism the narrative changed dramatically. Whereas the Founding Fathers of New Constitutionalism predicted the eternal rule of the values of liberal constitutionalism, controlled by the constitutional judiciary, at the end of the second decade of the 21st century some of those constitutional courts proved powerless to stop yet another transformation of the political landscape in the region. My paper tries to show the rise and decline of liberal constitutionalism in the region of Central Eastern Europe in the last thirty years. First, I will show the original expectations and enormous optimism surrounding the model of new constitutional judiciary in the 1990s. The institutional settings of the new constitutional courts were made to provide the checks on the potential threats to the liberal model of the rule of law. Liberal democracy was taken for granted, being the only political model for the region in the early 1990s. However, already then the first disruptions to the narrative appeared. Two decades later, the situation changed considerably. The constitutional courts often did not act as a powerful check on the will of political beasts, in some nations the constitutional courts were even utilized in creating a new model of illiberal democracies. I will try to explain the reasons for the demise of constitutional review facing the challenge of illiberalism. Last but not least I would like to analyze what chance do the general courts have to stand up for liberal democracy against the authoritarian regime.

CONSTITUTIONAL PLURALISM AFTER BREXIT

Cormac MacAmahlaigh, University of Edinburgh

Abstract

This contribution will examine the usefulness and relevance of the idea of constitutional pluralism with respect to the relationship between the EU and Member states' legal systems (and the UK in particular) in the aftermath of the UK's decision to withdraw from the EU. The UK's decision to withdraw from the European Union seems to question the utility of this resolutely 'post-sovereign' model of relations between state administrations and their supra- national counterparts in that it can be interpreted as a reassertion of classic ideas of the centralised sovereign state. The paper looks at the various features and relationships affected by the Brexit process analysing the relevance of constitutional pluralism to each relationship pre- and post- Brexit. The paper concludes that, whereas Brexit clearly affects the different relationships involved, constitutional pluralism can and will remain relevant to EU/UK relations into the future. This, in turn, raises broader questions as to the extent to which such classic understandings of sovereignty which were influential in the movement for Brexit, have any relevance in an increasingly interdependent world.

BETWEEN MIMESIS AND PARASITISM: POPULISM AND CONSTITUTIONALISM IN A COMPARATIVE PERSPECTIVE

Giuseppe Martinico, Scuola Sant'Anna Pisa

Abstract

The relationship between populism and constitutionalism should not be seen in terms of mutual exclusion and perfect opposition. Indeed, it is possible to say that populism frequently relies on concepts and categories belonging to the language of constitutionalism (majority, democracy, people), trying to reshape them and offering this way a sort of constitutional counter-narrative (Corrias, 2016). This kind of approach can be described in light of two concepts: mimesis and parasitism. Mimesis here refers to the way in which populist leaders try to present themselves as consistent and compatible with the language of constitutionalism. An example of this I is the recent speech given by the Italian premier Giuseppe Conte at the United Nations where he said that: "When some accuse us of souverainism or populism, I always enjoy pointing out that Article 1 of the Italian Constitution cites sovereignty and the people". Here one can say the attempt at finding a consistent reading with the text of the Italian constitution by stretching, at the same time, some of its key concepts. This has led some scholars (Fournier, 2018) to describe populism by employing the "parasite analogy". According to this idea, populism would imply parasitism since it aims at altering the hierarchy of values of constitutional democracy: "Populist rhetoric can be defined as the political discourse aiming to convince a fictional majority that constitutional democracy gives rise to the tyranny of minorities" (Fournier, 2018).

While, as said, populism aims at creating a counter-narrative alternative to that employed by constitutionalism, this paper will question the possibility of speaking of a populist constitutionalism (Blokker, 2017). As it will be argued, in fact, accepting the validity of this category would result in denying the counter-majoritarian nature of constitutionalism. In order to show how constitutionalism could react to the populist challenge some lessons from comparative law will be recalled, especially looking at the anti-populist potential of the very famous 1998 Reference Re Secession of Quebec thanks to the complex notion of democracy endorsed by the Canadian Supreme Court on that occasion (Mendes, 2017; Martinico, 2018).

PRETENCE OF CONSTITUTIONAL DEMOCRACY

Gábor Attila Tóth, Humboldt University, Berlin

Abstract

After many waves of democratization a new type of constitutional transformation has become the focus of scholarly attention. Autocratic leaders gain the power peacefully and legitimize themselves through popular elections and referendums. Regular multiparty elections are held, and elected officials make laws in the legislative body. Controlling constitutional institutions remain in place, blatant prohibitions and censorship are not experienced every day. Not only the cases of Hungary and Poland (two EU Member States), but also of Russia (probably the first regime of this kind), Turkey and many other countries epitomize this phenomenon, in which the country in question adopts constitutional transformation that moves it ever further from, rather than toward, democratic principles. Countries from Azerbaijan to Venezuela demonstrate that, when a populist executive gains concentrated power, a reshaped constitution may serve autocratic aspirations. What's more, as the new administration in the United States shows, even a democratic system with a long pedigree of democratic traditions has not been entirely immune to the outbreak of authoritarian political ideas and practices.

Some researchers claim that the current erosion of constitutionalism can be understood better if the phenomenon is compared to the interwar period and the rise of fascism in Europe and beyond. Many others argue that what is happening today is a self-destruction of liberal democracy through democratic procedures and under the formal rule of law.

The presentation aims to contribute to the understanding of the new system, and offers another approach. It shows that in a normative sense democracy today is the only legitimate constitutional system. That is why a key attribute of contemporary authoritarianism, a sui generis system between constitutional democracy and dictatorship, is a pretence of democracy. The article suggests that mechanisms of pretence can be identified with the help of constitutional markers, which allow a reliable distinction between constitutional democracy and authoritarianism. Constitutional markers can be revealed on two levels: first, by a systematic account of the constitution making procedure and constitutional text, and second, by exploring the deep structure of the false justification of the system.

THE RULE OF LAW IN POLAND REGARDING JUDICIARY – DEVELOPMENTS AND PROSPECTS

Mirosław Wróblewski, Office of the Comissioner of Human Rights of the Republic of Poland

Abstract

The Ombudsman monitors the situation in Poland concerning rule of law as it protects people from arbitrariness of public power. The Ombudsman is especially monitoring the situation concerning the independence of judiciary, as in this area we have to meet the greatest challenges which affect citizens' right to access an independent and impartial court. Right to a court is a fundamental right which is safeguarded by the Constitution of Poland (Article 45), the European Convention on Human Rights (Articles 6 and 13) and the EU Charter of Fundamental Rights (Article 47), and also a prerequisite to effectively ensure nearly all the other human rights (see J. Weiler).

The changes in the functioning of common courts, the National Council of the Judiciary and the Supreme Court increased the sway of political factors on the judiciary, thereby impairing the human rights protection system, since independent courts are prerequisite essential for the rule of law and are a basic guarantee of the reliability of court proceedings. According to the judgements of the European Court of Human Rights, independence of the judiciary does not only refer to the performing of the duties of the judge in individual cases but also to the organization of the judiciary (structural independence). From this point of view, it is extremely important whether the considered body appears independent, as independence is essential for maintaining the trust that courts should enjoy in a democratic society. This trust in the independence of courts has just been seriously undermined in Poland through the organizational changes in the judiciary.

Last months the situation regarding the Supreme Court was especially troublesome. The judges reaching 65 (beforehand – 70) were forced to retire earlier. It is only as a result of the CJEU preliminary interim measure issued on 19 October 2018, that 22 retired judges of the Supreme Court have come back to work. For the sake of clarity in the Polish law, amendment to the law on the Supreme Court was adopted. It confirmed that previously retired judges of the Supreme Court have a power to adjudicate cases normally.

Also the status of the National Council of Judiciary is highly disputable. Amendment of the Act on the National Council of Judiciary provided for a creation of a body, whose judicial members were appointed

by 3/5 of the Parliament, and not by peers. In the opinion of the Ombudsman this new method of selection of the judicial members is contrary to the Polish Constitution and constitutional tradition. After the legislative change the process of selection of new judicial members was made in a highly non-transparent manner. Every judicial candidate could be submitted upon recommendation of 25 fellow judges. However, until today – despite motions submitted by the non-governmental organizations, the public opinion do not know who supported those candidates.

The Ombudsman also monitors closely disciplinary measures against judges. Some charges were initiated against judges participating in constitutional moot courts, for making a preliminary reference to the CJEU or for criticizing publicly the legislative changes concerning judiciary. Every disciplinary case which is initiated by authorities and which may seem as having a political character is monitored by the ombudsman office.