Bringing a Hammer to the Chess Board

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Imagine a perverted chess competition during which one of the competitors takes an iron hammer to every single chess match where, in front of everyone, he hits his opponent on the hand if the intended move seems to be too smart. If you were a member of the audience (with purely academic interest) watching this take place, then you would probably not attempt to thoroughly analyze the actual chess moves or to reconstruct the match in a chess journal either, and you would frown upon those who do for their hypocrisy. Doing so presupposes that the result of the match actually depended on the smartness of the chess moves.

The Rule of Law as a Precondition of Doctrinal-Conceptual Legal Thinking

In cases where constitutional law is slowly losing its normative force, sophisticated doctrinal-conceptual systems *(Verfassungsdogmatik)* may even become ridiculous and, to some degree, dishonest. While showing a very few examples of doctrinal absurdities in a judgment of a captured and subservient constitutional court can be meaningful (also in order to corroborate the claim about its captured nature), writing a thorough doctrinal analysis on such a judgment is a futile, frustrating and meaningless exercise (see the podcast by Franz C Mayer on Verfassungsblog on the Polish Constitutional Court).

A thorough doctrinal analysis can even legitimize the theater of legalism by taking seriously words which are not worth to be taken seriously. Judicial decisions of captured courts and doctrinal writings of pro-autocracy academics in these countries can be viewed as merely performative acts (as opposed to reasons). While they can be analyzed as empirical material for studying the phenomenon of rule-of-law erosion, they are unsuitable for use in thorough doctrinal, systematic-conceptual legal work. Both judicial case-law and doctrinal scholarship feed on coherence, but autocratic constitutional regimes are by their very nature *ad hoc* and arbitrary.[1)] A terminological remark for conceptual clarity: by autocracy or autocratic I mean in the present contribution the lack of the rule of law. For the relationship between democracy and the rule of law during erosion, see in more detail András Jakab, What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law. Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-15. Available at SSRN (Constitutional Studies 6. 2020. 5-34).

The picture, of course, can be differentiated: certain parts of the legal system can remain relatively intact (e.g., tort law or company law, which are politically less relevant), keeping such doctrinal-legal conceptual analyses still meaningful – while

others (especially constitutional law, or just politically sensitive specific areas of constitutional law) decline. And the situation can also change from year to year: when the constitutional takeover has not yet completed, it can be entirely legitimate to try to halt it by means of thorough doctrinal-conceptual analysis (e.g. in the form of a commentary, a case-note or an amicus curiae). Once the takeover is complete, however, the same writings can acquire an unintended legitimizing function. The frontiers between the two stages are in real life not always clear or become clear retrospectively (and the question of degree can best be answered with the help of various rule-of-law indices), but in order to understand the methodological (and moral) dilemma in its extremity, it is useful to simplify here.

Throughout the legal history of 19th and 20th centuries, doctrinal-conceptual analysis received ever new boosts whenever the rule of law was extended to a new area. Judicial review of administrative acts resulted in more sophisticated doctrinal-conceptual administrative law, and the spread of constitutional courts (or supreme courts with similar competences) resulted in more sophisticated *Verfassungsdogmatik*. The 19th century development of the rule of law in legal reality enabled analytical jurisprudence (John Austin, Felix Somló) and doctrinal legal positivism in the area of public law (Paul Laband, Otto Mayer, Edmund Bernatzik, Ern# Nagy): concentrating on doctrinal-conceptual, instead of contextual analysis became a meaningful and plausible methodological position. With the currently ongoing constitutional erosion of the rule of law, we observe changes in the opposite direction in autocratizing countries. Methodological and theoretical approaches to law presuppose specific types of legal regimes. Being purely positivist-doctrinalist is one of the meaningful methodological positions in countries where the rule of law is in excellent shape; but staying exclusively positivist-doctrinalist when dealing with the constitutional law of a hybrid regime is autistic and/or cynical.

The Methodological Challenge of Autocratization for Scholarly Writing

In case of rule-of-law erosion, a key problem is the slow demise of the normative force of constitutional law, i.e. the gradually growing chasm between constitutional law and constitutional reality. In such regimes, amendments to formal legal acts have little to say about what and how things will change. If we do not want to remain blind to erosion, besides considering the formal rules, we must also examine the *de facto* conduct of both officials and citizens, and the narrative accompanying it (the latter includes the social mentality and the political rhetoric regarding constitutional institutions). If in our academic work we are interested in describing and explaining erosion, we should adjust methodologically to the partially non-legal nature of erosion.

Especially during the advanced stage of autocratization (when the erosion has already been established many times, both in scholarship and in various reports of international organizations), it is better to adjust our methods. Traditional doctrinal-legal analysis will not tell you anything new anyway (except that autocratic regimes

can be skillful and creative with nasty legal tricks), and you will look like a fool for taking the pretended legalism of the regime seriously, yet again another time.

Therefore, the currently ongoing autocratization does not simply deliver a new set of questions for constitutional lawyers, but it also motivates us to rethink the methods of constitutional scholarship. Purely doctrinal-conceptual analyses are likely to become less (in certain countries perhaps much less) attractive than before. And institutionalist analyses combining legal doctrinal-conceptual and social science methods are likely to gain further popularity in the future.

PS. The dilemmas are somewhat different, if the issue is not simply to understand and explain autocratization for the scholarly community (wherever you are, maybe even at a foreign university in a stabile constitutional democracy), but if you have to teach constitutional law at a university which is geographically located in an actual autocratizing country. In the latter case, difficult moral and practical choices have to be made every day, but that should be the topic of another blog entry.

References

- 1. A terminological remark for conceptual clarity: by autocracy or autocratic I mean in the present contribution the lack of the rule of law. For the relationship between democracy and the rule of law during erosion, see in more detail András Jakab, What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law. Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-15. Available at SSRN (Constitutional Studies 6. 2020. 5-34).
